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Tax Equity

ANTHONY C. INFANTI†

Uniformity breeds conformity, and conformity's other face is intolerance.

Zygmunt Bauman¹

The starting-point of critical elaboration is the consciousness of what one really is, and is "knowing thyself" as a product of the historical process to date which has deposited in you an infinity of traces, without leaving an inventory. It is necessary initially to make such an inventory.

Antonio Gramsci²

INTRODUCTION

Each year when I teach federal income tax, one of the topics that I reflexively cover with my students in the first or second class is the triad of tax policy concerns—efficiency, equity, and administrability—that will inform many of our discussions during the semester. Whether the

† Associate Professor of Law, University of Pittsburgh School of Law. I would like to thank Dorothy Brown, Leandra Lederman, Edward McCaffery, and Beverly Moran for their comments on drafts of this paper. I would also like to thank those who attended my presentation of this paper at the Law & Society Conference and the participants at the Texas Junior Legal Scholars Conference at Texas Wesleyan University School of Law for their helpful comments. I would like to thank the University of Pittsburgh School of Law for providing financial support for the writing of this Article.

1. ZYGMUNT BAUMAN, *GLOBALIZATION: THE HUMAN CONSEQUENCES* 47 (1998).
2. As quoted in PETER IVES, *LANGUAGE AND HEGEMONY IN GRAMSCI* 79 (2004).

topic is an objective test for deducting the cost of work-related clothing or the propriety of taxing capital gains at preferential rates, I have found that introducing students to the notion that we should strive for a tax system that (1) minimizes interference with economic decisionmaking, (2) is fair, and (3) is easy to administer and comply with, helps them to see tax not as a dry and arcane subject, but as one that involves the balancing of important policy considerations that have a real, everyday impact on all of our lives. Evidence that others share in the belief that it is important to introduce these tax policy concerns to students early on in their tax education can be found in the large number of basic income tax textbooks that begin with a discussion of them.³

Tax equity, the topic of this Article, has influenced not only classroom debate, but also political debates and, to a lesser extent, judicial application of the tax laws.⁴ In

3. *E.g.*, WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 6-9 (5th ed. 1999); JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 117-35 (3d ed. 2004); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 27-31 (5th ed. 2005); SANFORD M. GUERIN & PHILIP F. POSTLEWAITE, PROBLEMS AND MATERIALS IN FEDERAL INCOME TAXATION 8-14 (5th ed. 1998); MICHAEL A. LIVINGSTON, TAXATION: LAW, PLANNING, AND POLICY, at xxxiv-xxxix (2003); LAURIE L. MALMAN ET AL., THE INDIVIDUAL TAX BASE: CASES, PROBLEMS AND POLICIES IN FEDERAL TAXATION 8-15 (2002); PAUL R. MCDANIEL ET AL., FEDERAL INCOME TAXATION 1-4 (5th ed. 2004); JOEL S. NEWMAN, FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 24-26 (3d ed. 2005); RICHARD A. WESTIN, BASIC FEDERAL INCOME TAXATION 31-35 (2002).

4. *See, e.g.*, LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 12-13 (2002) (discussing the influence of tax justice in political debates); William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 CASE W. RES. L. REV. 1 *passim* (2006) (contrasting the U.S. Supreme Court's hands-off approach to applying the Equal Protection Clause as well as more general notions of equality in its constitutionally-based tax decisions with the German Constitutional Court's more frequent reliance on notions of equality in its decisions); Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 421, 427-38 (2004) (asserting that while, "[i]n the legislative arena, the concepts of fairness and utility remain fundamental to the formulation and administration of federal tax policy," the U.S. Supreme Court has failed to employ notions of tax equity in determining the constitutionality of taxing statutes); Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX REV. 259 *passim* (2006) (contrasting the U.S. Supreme Court's infrequent use of fairness in its constitutionally-based tax decisions with the German Constitutional Court's more frequent reliance on fairness in its decisions); Richard J. Wood,

academic circles, however, tax equity has engendered significant controversy. For decades, commentators have debated the choice of progressivity (as opposed to proportionality or regressivity)⁵ as the most appropriate means of achieving “vertical” equity in the income tax (i.e., of differentiating the tax burdens imposed on taxpayers with unequal incomes).⁶ Of late, “horizontal” equity—the intuitively appealing notion that taxpayers with equal

Supreme Court Jurisprudence of Tax Fairness, 36 SETON HALL L. REV. 421 *passim* (2006) (discussing the U.S. Supreme Court’s use of horizontal and vertical equity principles in analyzing tax issues).

5. To illustrate the concepts of progressivity, proportionality, and regressivity, let us take the income tax as an example. A “progressive” income tax is one in which the tax rates rise as income rises. NEWMAN, *supra* note 3, at 18-19. Our current income tax is progressive in the sense that the rates are graduated; that is, the rates increase from 0%—for those with taxable incomes less than the amount of the standard deduction plus the personal exemption—in several steps as a taxpayer’s taxable income rises, until reaching the top rate of 35%, which, in 2006, applied only to taxpayers with taxable incomes of more than \$336,550. I.R.C. § 1 (2000 & West Supp. 2007); INTERNAL REVENUE SERV., DEP’T OF TREASURY, 1040 INSTRUCTIONS, at 79 (2006). In contrast, a “proportional” income tax “is one in which all taxpayers pay the same percentage of their income.” NEWMAN, *supra* note 3, at 17. Under a proportional income tax, the actual amount of tax paid would rise with income; however, the tax rate would remain the same for everyone. For example, under a proportional income tax imposed at 10%, individual A with \$10,000 of income and individual B with \$100,000 of income would pay tax at the same rate (i.e., 10%). The two would, however, pay very different amounts of tax: A would pay \$1,000 of tax (i.e., 10% of \$10,000), and B would pay \$10,000 of tax (i.e., 10% of \$100,000). In other words, under a proportional income tax, B would pay ten times as much tax as A—even though they would both pay tax at exactly the same rate—because B has ten times as much income as A. *See id.* at 18. A “regressive” income tax is one in which “higher income taxpayers would pay a lower rate of tax than lower income taxpayers.” *Id.* at 21. For example, to take individuals A and B from our discussion of proportionality, B would pay *less* tax than A under a regressive income tax, even though B has *ten times as much* income as A.

6. *See* Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 919-20 (1997) (“Progressive taxation . . . has sparked more than a century of controversy.”). *Compare* Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952), with Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, “Globalization,” and the New Millennium*, 4 FLA. TAX REV. 731 (2000). For recent contributions to this debate, see, for example, Mirko Bagaric & James McConvill, *Stop Taxing Happiness: A New Perspective on Progressive Taxation*, 2 PITT. TAX REV. 65 (2005); Neil H. Buchanan, *The Case Against Income Averaging*, 25 VA. TAX REV. 1151 (2006); Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399 (2005).

incomes should be treated equally—has also come under fire for, among other things, its lack of independent significance.⁷ Some commentators have taken aim at both horizontal *and* vertical equity, arguing that they lack independent normative content and contribute nothing beyond conceptual confusion to the tax policy debate.⁸

Yet, despite these critiques, all mention of horizontal and vertical equity has far from disappeared from the pages of law reviews.⁹ Both “mainstream” and critical¹⁰ tax scholars have embraced horizontal and vertical equity in their contributions to the tax policy literature,¹¹ indeed, there has been some debate about whether critical tax theory raises issues of horizontal as opposed to vertical

7. E.g., Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989); Louis Kaplow, *A Note on Horizontal Equity*, 1 FLA. TAX REV. 191 (1992); Richard A. Musgrave, *Horizontal Equity: A Further Note*, 1 FLA. TAX REV. 354 (1993); Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113 (1990); see also John A. Miller, *Equal Taxation: A Commentary*, 29 HOFSTRA L. REV. 529 *passim* (2000) (discussing challenges to the concept of horizontal equity); cf. Jeffrey H. Kahn, *The Mirage of Equivalence and the Ethereal Principles of Parallelism and Horizontal Equity*, 57 HASTINGS L.J. 645, 652 (2006) (“Many persons do give weight to horizontal equity, and even those who do not frown on unequal treatment of the same item.”).

8. Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607, 613, 621-22 (1993); see also MURPHY & NAGEL, *supra* note 4, at 8, 174 (arguing that we should replace our focus on equity in the distribution of tax burdens with a broader view of distributive justice that evaluates taxes as part of the property rights system that taxes help to create).

9. On February 26, 2007, I performed a search in the “U.S. Law Reviews and Journals, Combined” database on LEXIS to ascertain the number of articles published during the previous ten years in which the words “horizontal equity” or “vertical equity” appeared within eight words of “tax” or “taxation.” This search returned a total of 311 hits.

10. The burgeoning area of critical tax theory fills a gap in the traditional tax discourse by providing “serious consideration of how the tax system exacerbates marketplace discrimination against traditionally subordinated groups.” Karen B. Brown & Mary Louise Fellows, *Introduction* to TAXING AMERICA 1, 1-2 (Karen B. Brown & Mary Louise Fellows eds., 1996).

11. See, e.g., Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 911-12, 932 (2002); Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 48-58 (2006); Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807 *passim* (2005); see also *infra* Part II.B.2.

equity.¹² There has even been speculation that some of the misunderstanding between these two groups of tax scholars stems from a failure to see critical contributions in the same tax equity light.¹³ As it turns out, however, the problem is not that “mainstream” and critical tax scholars are talking past each other, but that critical tax scholars attempt to frame their discussions in tax equity terms at all.

Approaching the concept of tax equity itself from a critical perspective, the basic thesis of this Article is that the extant critiques of that concept miss the mark in an important respect. Far from lacking normative content, tax equity abounds with it. For example, as defined and applied for purposes of income tax policy analysis, tax equity is solely concerned with the fair treatment of individuals who either have the same or different incomes.¹⁴ This represents a normative choice to consider economic differences—and *only* economic differences—in determining the fairness of a tax whose larger purpose is to allocate the burden of funding our government and of paying for public services.¹⁵

12. See Livingston, *supra* note 6, at 757-58; Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1819-21 (1998).

13. See Michael A. Livingston, *Radical Scholars, Conservative Field: Putting “Critical Tax Scholarship” in Perspective*, 76 N.C. L. REV. 1791, 1792 (1998).

14. The concept of tax equity can be (and, in fact, has been) applied in other areas of tax as well. See, e.g., Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757 *passim* (2004) (applying horizontal and vertical equity analysis to the estate and gift taxes); Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 59-60 (2005) (applying a horizontal equity analysis to the estate tax). The discussion of tax equity in this Article, like the tax policy literature in general, will primarily focus on the individual income tax, with only passing references to other taxes. Nonetheless, much of the discussion in the text below applies equally to other forms of taxation.

15. As Alice Abreu has observed, the tax system not only imposes burdens on taxpayers, but also empowers individuals when it gives them “the ability to affect either the amount of tax that will be collected or the identity of the bearer of the resulting economic burden.” Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1, 6 (1996). Abreu argues that tax policy analysts should broaden their focus to include such empowerment because (1) it can (usually adversely) affect the progressivity of the tax system, (2) it can affect the visibility and accountability of the tax system, and (3) it essentially privatizes decisionmaking concerning the allocation of the tax burden. *Id.* at 6-9.

Through this insidious homogenization of the population, tax equity performs a sanitizing and a screening function; in other words, it effectively forecloses consideration of non-economic forms of difference (e.g., of race, ethnicity, gender, sexual orientation, or physical ability) when determining the appropriate allocation of societal burdens, even though these other forms of difference have served, and continue to serve, as the basis for invidious discrimination that already imposes heavy burdens on its victims. Put differently, and a bit more bluntly, tax equity, with its ostensible concern for fairness, is often the most logical avenue for introducing critical concerns into tax policy debates;¹⁶ however, the concept is defined in such a way as to bar entry to precisely these types of concerns. It should come as no surprise, then, that “mainstream” tax scholars tend to be so resistant—and, at times, openly hostile—to critical contributions to tax policy debates.

Before closing this Introduction, a few words on the scope of this project are in order. My purpose in writing this Article is *not* to offer an alternative definition of tax equity. My immediate purpose is far more modest, though my larger purpose is both broader and more subversive.¹⁷ Initially, I hope to raise all tax scholars’ consciousness of the subtle ways in which “common sense” concepts can influence their thinking in unexpected ways. If nothing else, I would be quite happy if you never think of, write about, or teach tax equity in the same way again—I certainly know that I won’t. I wish to plant a seed of doubt in your mind that will cause you to begin to question concepts, like tax equity, that otherwise seem normal, natural, or plainly incontestable. If that seed takes root and begins to grow, my further hope is that some among us

16. The other two in the triad of overarching tax policy concerns (i.e., efficiency and administrability) are not likely points of entry due to their ostensible concern with the economic neutrality of the tax and the ability of taxpayers to comply with, and the Internal Revenue Service to administer, the tax.

17. This project actually began with an earlier article that highlighted the artificiality of the mainstream/marginal distinction in the tax policy literature and drew attention to the ways in which that distinction can be employed to ignore or discredit critical contributions to the tax policy literature. Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005).

(whether me, you, or someone else) will begin to offer competing ideas about what makes a tax system fair—ideas that will embrace not only fairness to the privileged among us, but to the oppressed as well.

The remainder of this Article consists of four parts. Part I deconstructs the concept of tax equity and explores how its homogenizing, sanitizing, and screening functions play out in both critical contributions to the tax policy literature and critiques of those contributions. Part II then anticipates several critiques of this rethinking of the concept of tax equity and counters them. Part III explores why, from the perspective of the dominant group, constructing a concept of tax equity that so narrowly focuses on the economic dimension of people is such a powerful rhetorical move. This exploration is largely guided by Antonio Gramsci's concept of "hegemony," which posits that a social group dominates others through a combination of force and control over ideas. The Conclusion consists of brief remarks regarding this consciousness raising project.

I. MUSINGS ON THE MEANING OF "EQUITY"

A. *Of Positive Public Faces*

Equity. In the legal realm, we hear this word (or its adjectival and adverbial forms, "equitable" and "equitably") so often and in such favorable contexts that we are almost bound to find it pregnant with positive connotations. Indeed, in common legal usage, "equity" usually connotes "[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances."¹⁸ Thus, we tend to associate "equity" with the good work of righting injustices—those either that would result from an unduly strict application of the law or for which the law provides no remedy at all. For example, early on in law school, we all became aware of (even if we didn't quite understand) the largely historical difference between courts of "law" and courts of "equity." Nonetheless, the one message that always seemed to come through loud and clear, at least for

18. BLACK'S LAW DICTIONARY 579 (8th ed. 2004); *see also* 5 THE OXFORD ENGLISH DICTIONARY 358 (2d ed. 1989) (listing this meaning first under the heading of uses of the word "equity" in jurisprudence).

me, was that the equity courts were created to remedy the inability of courts of law to do justice in certain cases.¹⁹

Other examples of the reparative and gap-filling connotations of the word "equity" abound. For instance, we permit the *equitable* tolling of statutes of limitation "to prevent unfairness to a diligent plaintiff."²⁰ We speak of the *equitable* distribution of property upon divorce, as opposed to the former approach in common law states that could severely disadvantage homemakers by awarding property based on how it was titled or the source of funds used for its purchase.²¹ Some courts now employ the *equitable* parent doctrine "to recognize as a 'parent' an individual who has lived with and cared for the child in the role of parent" but who would not otherwise be considered a legal parent of that child.²² Similarly, courts apply the related *equitable* estoppel doctrine to prevent a legal parent from denying another's parental status.²³ Finally, though this is far from an exhaustive list, the *equitable* recoupment doctrine in federal tax law permits "a taxpayer to offset a tax collected erroneously against a proper assessment where the two relate to the same taxable event or, if the taxpayer sues for a refund, allow[s] the IRS to offset an otherwise barred deficiency against an otherwise refundable overpayment."²⁴

In the tax policy context, however, the word "equity" does not bear such gap-filling or reparative connotations. Rather, when we speak of tax equity (whether of the horizontal or vertical variety), we are using the word "equity" in the more general sense of "[t]he quality of being equal or fair; fairness, impartiality; evenhanded dealing."²⁵

19. See RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 84-86 (4th ed. 2005); see also 1 MOORE'S FEDERAL PRACTICE § 2.02 (Daniel R. Coquillette et al. eds., 3d ed. 2007) (discussing the difference in the context of the merger of law and equity in the federal court system).

20. 51 AM. JUR. 2D *Limitation of Actions* § 174 (2000).

21. See AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* § 4.06 reporter's note to cmt. a (2000); J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 13.02 (2006).

22. AM. LAW INST., *supra* note 21, § 2.03 cmt. b.

23. *Id.*

24. 4A BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 113.10(2) (2d ed. 1992).

25. 5 THE OXFORD ENGLISH DICTIONARY 358 (2d ed. 1989); see also BLACK'S LAW DICTIONARY 579 (8th ed. 2004).

Even without the halo effect of the common legal usage of the word “equity,” this more general sense still carries positive connotations of its own:²⁶ Anyone who devotes herself to the task of furthering the equity of our tax system must, by definition, be engaged in the noble task of making that system fairer—of ensuring that all taxpayers are treated in an impartial and evenhanded manner. Who is likely to object to such efforts? Or, put differently, who would argue in favor of laboring for the unfair, partial, or biased treatment of taxpayers?

B. . . . and Hidden Dark Sides

1. *Looking Behind the Public Face.* Despite the positive feelings that we might have when we speak of tax equity, something a bit sinister actually lurks behind these words. A good starting point for our exploration of this hidden dark side is to look at the etymology of the word “equity.” *The Barnhart Dictionary of Etymology* indicates that “equity” was borrowed from the Old French word “*equité*,” which, in turn, was a “learned borrowing from Latin *aequitātem* (nominative *aequitās*), from *aequus* even, just, EQUAL.”²⁷ *The Online Etymological Dictionary* includes in its similar entry for “equity” the meaning of the Latin word *aequitātem*, which it defines as “equality, conformity, symmetry, fairness.”²⁸ *The Barnhart Dictionary of Etymology* further adds some useful information under its entry for the word “equal,” which it indicates was “borrowed from Latin *aequālis* uniform, identical, equal, from *aequus* level, even, just”²⁹

I realize that you are probably now wondering what exactly is dark or sinister in this etymology. But, if you go back and re-read the last paragraph in search of a theme, you will hopefully be struck by the following words: even,

26. See, e.g., Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 739-40 (2003) (“Equity is good. No one argues that an equitable state is morally or functionally flawed.”).

27. THE BARNHART DICTIONARY OF ETYMOLOGY 338 (Robert K. Barnhart ed., 1988).

28. ONLINE ETYMOLOGICAL DICTIONARY, <http://www.etymonline.com/index.php?term=equity> (last visited Oct. 11, 2007).

29. THE BARNHART DICTIONARY OF ETYMOLOGY, *supra* note 27, at 337.

equal, equality, conformity, symmetry, uniform, identical, and level. All of these words connote *sameness*. Simply recognizing that the word "equity" is grounded in notions of sameness will go far in helping us to see the dark side of tax equity.

As mentioned earlier, discussions of tax equity are typically phrased in terms of one or both of its two subtypes: horizontal equity and vertical equity. When applied to the income tax, horizontal equity is conventionally defined as treating taxpayers with equal incomes equally, and vertical equity is conventionally defined as an appropriate differentiation in the tax burden imposed on taxpayers with unequal incomes.³⁰ On its face, then, tax equity appears to take into consideration both sameness *and* difference when determining a fair allocation of the overall income tax burden. But, as the saying goes, appearances can be deceiving. Even though the heuristics of horizontal and vertical equity do direct the attention of those concerned with fairness toward the proper treatment of taxpayers who are similarly situated *and* those who are differently situated, there is only *one* type of sameness or difference that counts in these explorations of tax equity: sameness or difference of *income*. In other words, for purposes of determining the fairness of the income tax, the concept of tax equity presupposes homogeneity in the population along all lines except one: income.³¹ This

30. *E.g.*, 1 BITTKER & LOKKEN, *supra* note 24, ¶ 3.1.4; MURPHY & NAGEL, *supra* note 4, at 13; Kahn, *supra* note 7, at 650; McDaniel & Repetti, *supra* note 8, at 612; Staudt, *supra* note 6, at 926, 933.

31. See Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 1073-74 (2006) (describing how comprehensive tax base theory and progressivity—that is, the conventional implementation of vertical equity in our tax system—have “almost no capacity to deal with differences—other than differences in income—in taxpayers’ abilities to pay taxes”). This homogenizing influence can even be seen in Murphy and Nagel’s book, which, on its face, appears to promote a holistic approach to formulating tax policy. Despite advocating “that societal fairness, rather than tax fairness, should be the value that guides tax policy,” MURPHY & NAGEL, *supra* note 4, at 173, Murphy and Nagel repeatedly frame their discussion in terms of “economic” or “distributive” justice, *id.* at 3, 4, 6, 7, and they further describe the “dominant theme” of their book in the following terms:

Private property is a legal convention, defined in part by the tax system; therefore, the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent

supposition is, of course, wholly groundless—but, as we will see, it is far from harmless.

In reality, people are also grouped and divided along lines other than income. Race, ethnicity, gender, sexual orientation, and disability are just a few of the notable additional lines along which such groupings and divisions (often invidiously) occur in everyday life. Yet, horizontal and vertical equity efface these lines of similarity and difference. They transform three-dimensional, flesh and blood individuals into two-dimensional accounting statements, reducing them to no more than the sum of their transactions in the economic marketplace. Horizontal and vertical equity take race, ethnicity, gender, sexual orientation, disability, and other characteristics into account only if, and to the extent that, they happen to have an impact on economic income—all other effects are simply ignored. By assuming a far more homogeneous population than the one that actually exists, horizontal and vertical equity screen from the tax policy debate many issues relating to race, ethnicity, gender, sexual orientation, and disability, and they tend to transmute any remaining issues into ones of economic class. As we will explore more fully in Part III, this is a powerful rhetorical move that simultaneously sanitizes the debate over tax fairness—cleansing it of uncomfortable discussions of racism, sexism, heterosexism, and disability discrimination—and allows that debate to be easily manipulated in favor of those with wealth and power.

The idea that tax equity has such effects—in other words, that it ignores all but the economic dimension of people—should not be surprising. Equity is just one aspect of tax policy analysis. The other two tax policy considerations that commentators routinely take into account are efficiency and administrability, both of which look at tax from an economic perspective. Efficiency is the most unabashedly economic of the three tax policy concerns: in

existence and validity. Taxes must be evaluated as part of the overall system of property rights that they help to create. Justice or injustice in taxation can only mean justice or injustice in the system of property rights and entitlements that result from a particular tax regime.

Id. at 8.

Moreover, Murphy and Nagel explicitly disclaim any discussion of invidious discrimination in their book and confine themselves instead to discussing the “purely economic impact” of the “justice of taxation.” *Id.* at 25-26, 39.

common tax parlance, "efficiency" means reducing to a minimum the tax system's interference with economic decisionmaking.³² Perhaps a bit less obviously, the criterion of administrability also embodies an economic perspective on tax policy. Indeed, Samuel Donaldson has persuasively argued that administrability should be viewed not as a separate tax policy goal, but as no more than a component of the larger goal of achieving an efficient tax.³³ In this sense of the word, efficiency entails something akin to a cost-benefit analysis to determine the economic viability of a tax. As we know, an "administrable" tax is one that minimizes the burdens on taxpayers in complying with it and reduces the costs to the government of enforcing it.³⁴ A more administrable tax is, therefore, likely to be a more profitable tax (at least from the government's perspective), because (1) reducing burdens on taxpayers frees them up to dedicate the extra time to income-producing—and, ideally, revenue-producing—endeavors and (2) reducing the government's cost of administering the tax increases the revenue raised by the tax.³⁵ With both efficiency and administrability impelling us to view tax policy from an economic perspective, it should be no wonder that equity likewise takes on a uniquely economic cast.

To pick up on Donaldson's point, equity too is not a truly separate tax policy goal. Like administrability, equity plays no more than a supporting role in achieving the overarching goal of an efficient tax.³⁶ At times, the "neutral" rules for achieving an efficient tax can produce anomalous

32. See Donaldson, *supra* note 26, at 741-42; see also 1 BITTKER & LOKKEN, *supra* note 24, ¶ 3.2 (describing the principal areas in which an income tax may have distortionary effects).

33. Donaldson, *supra* note 26, at 742-45.

34. *Id.* at 742-43; see also 1 BITTKER & LOKKEN, *supra* note 24, ¶ 3.8 (discussing complexity in the tax laws).

35. Donaldson, *supra* note 26, at 742-43.

36. See McDaniel & Repetti, *supra* note 8, at 619 ("Finally, it follows that the index will not assist in identifying relevant trade-offs in assessing proposed tax changes because [vertical equity] and [horizontal equity] both are derivative concepts. Because [horizontal equity] and [vertical equity] derive their normative base from economic judgments, values based on some theory of justice and efficiency concerns, the relevant trade-off is between or among those potentially conflicting fundamental judgments and values.").

results that we find objectionable.³⁷ Equity serves as the ethical or moral check—one that embodies a purely economic or distributive view of justice—that restrains efficiency sufficiently to render outcomes under our tax system politically acceptable.³⁸ Once we realize that equity is subordinate to efficiency in this way, equity's systematic erasure of all but the economic dimension of individuals nearly becomes a foregone conclusion.³⁹

2. *Manifestations of the Dark Side in the Critical Tax Literature.* The effects of framing arguments in tax equity terms can be seen in the critical tax literature. In this section, I present a series of examples from that literature to illustrate the subtle influence that tax equity has on the arguments made by critical tax scholars. Drawing on the discussion in the previous section, these examples illustrate the homogenizing and sanitizing effects of tax equity, the screening function of tax equity, and how tax equity is subsumed by efficiency concerns.

But, before embarking on this discussion, I would like to be clear that I am making no substantive critiques of, or comments on, the articles discussed here. My purpose is merely to demonstrate the subtle, yet pernicious effects

37. See EDWARD J. MCCAFFERY, *TAXING WOMEN* 195 (1997) (describing, for example, how an optimal tax approach would dictate taxing a dedicated child working to support an ill parent more than a beachcomber because the child's attachment to labor is relatively inelastic compared to that of the beachcomber); see also Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 486-87 (1987) (indicating that economic analysis "lends a patina of neutrality, because economics—particularly neoclassical economics—is viewed by many noneconomists (and even by some economists) as a 'science,' and therefore as factual and objective").

38. See MURPHY & NAGEL, *supra* note 4, at 7-8, 12-13, 188-90 (speaking of the role of moral ideas in legitimating our economic system and mentioning horizontal and vertical equity as the historical means of exploring the moral aspects of the tax system); Miller, *supra* note 7, at 545 ("The view that equality is an empty idea rests on an unrealistic and exaggerated view of the level of precision required in order for equality to have meaning. The idea that we should rely on market efficiencies to resolve equity concerns is a second best solution. Broad acceptance of either view may serve to unwisely loosen the restraints on tax policy that are at the core of a politically and morally acceptable tax system.").

39. I am not suggesting in this discussion that efficiency concerns are unimportant in tax policy debates; rather, my point throughout this Article is that efficiency should not be the *only* concern that is addressed in those debates.

that can result from framing a critical analysis in tax equity terms. With this clarification in mind, we can now turn our attention to the critical tax literature.

a. *Equity Subsumed by Efficiency.* The manner in which equity is quietly subsumed by the overarching goal of efficiency is best shown by example. In his book *Taxing Women*, Edward McCaffery accessibly describes the different tax pressures placed on lower-, middle-, and upper-income women.⁴⁰ McCaffery provides a compelling depiction of a tax system that is unfair to women because it “pushes against stable families at the lower-income levels, against working wives at the upper-income ones, and, by limiting satisfactory options, against the many families in between.”⁴¹ He explores in detail both the historical development of our deeply gendered tax system and the practical impact of that system on women’s decisions to enter or exit the labor market.⁴² After making a detailed and quite convincing case that historical biases have translated themselves into palpable social injustice, McCaffery found hope for combating the biases of our gendered tax system in “a standard idea in public finance economics, the theory of ‘optimal tax,’ which . . . has long recommended the strongest practical proposal [in McCaffery’s] book: tax married women less and married men more.”⁴³

Unsurprisingly, as McCaffery explains, “[o]ptimal tax is concerned with ‘utility’ and ‘wealth maximization,’ *with the economic ideal of ‘efficiency.’*”⁴⁴ At bottom, optimal tax theory’s recommendation to tax married women less than married men is based on married women’s more elastic attachment to paid labor. That is to say, because married men will continue to work even when their wages are

40. MCCAFFERY, *supra* note 37.

41. *Id.* at 1.

42. *Id.* at 11-160.

43. *Id.* at 164. In view of the focus of this Article, it is worth noting that Nancy Staudt opened her review of McCaffery’s book with the following sentence: “Edward McCaffery’s important new book, *Taxing Women*, explores the convergence between economic and feminist theory in the tax context.” Nancy C. Staudt, *The Theory and Practice of Taxing Difference*, 65 U. CHI. L. REV. 653, 653 (1998) (reviewing MCCAFFERY, *supra* note 37).

44. MCCAFFERY, *supra* note 37, at 164 (emphasis added).

reduced by taxes—and may actually respond by working more to make up the difference—while married women often respond to taxation by exiting the paid workforce in favor of unpaid (and untaxed) domestic work in the home, it is more efficient (i.e., less distorting) to tax married men than it is to tax married women.⁴⁵ Coincidentally, this also happens to be a more equitable result because it shifts some of the psychological burden of having to choose between working in the home or in the paid labor force from women to men.⁴⁶

Interestingly, McCaffery turns to economic efficiency to save the day because “optimal tax theory should help us to see the problems of taxing women in a better, brighter light, to generate reform proposals, and to see that this is not just a matter of one set of modern ‘liberal’ preferences being set up against earlier, more ‘conservative’ ones.”⁴⁷ Economics “also allows the criticism of the status quo to avoid charges of wanton social engineering—of the replacement of traditional family values with newfangled liberal ones. Optimal tax theory gives a solid, more or less ‘objective’ groundwork for criticizing the way we do things.”⁴⁸ In other words, economics frees us from value-laden discussions of tax fairness along the lines of race, ethnicity, gender, sexual orientation, disability, and/or other characteristics; it provides us with a sorely needed “neutral” vantage point from which to survey the tax terrain and to determine whether any changes should be made to the tax rules.⁴⁹

Viewed as neutral ground, economics becomes the ideal means for achieving equity: “Economics is best understood as being about means, or instrumental reasoning; our ends have to come from elsewhere. What better place than the goal of equal concern and respect for all of our citizens? Shouldn’t that come first?”⁵⁰ In this passage, we see how efficiency and equity become fused in the tax policy debate. We are told that the goal of equity is best achieved through

45. See *id.* at 170-84, 187-91.

46. *Id.* at 190-91, 193, 200-01.

47. *Id.* at 168.

48. *Id.* at 165.

49. This, of course, is another illustration of the sanitizing effect of framing an analysis in tax equity terms, which is explored more fully *infra* Part I.B.2.c.

50. McCaffery, *supra* note 37, at 169-70.

the medium of efficiency. The means, however, quickly swallow up the ends. As the overarching concern in tax policy analysis, efficiency soon takes on the primary role, with equity relegated to the supporting role of an ethical or moral check that fetters efficiency just enough to ensure that it does not produce anomalous (and politically unacceptable) results:

A large problem for social theory has been figuring out the means to get from here to there [i.e., to a more even sharing of domestic work]. Just asking for men to do more around the house, or crying out for institutional answers like better part-time work, does not seem to be doing the trick. Mild legislative solutions, such as family leave laws, have been ineffective and may even be counterproductive. But tax might just do it. We have seen repeatedly that tax has a unique power to motivate. And, lo and behold, optimal tax theory is telling us that taxing men more is exactly what society ought to be doing, if it cares about utility or social wealth. *It should so care, especially when justice and fairness go hand in hand with the economist's advice.*⁵¹

b. *Homogenizing Effect.* As mentioned above, once we recognize how efficiency subsumes equity, equity's systematic erasure of all but the economic dimension of individuals nearly becomes a foregone conclusion. Again, an example will help to illustrate the point. In their groundbreaking study of "whether the Internal Revenue Code [(Code)] systematically favors whites over blacks,"⁵² Beverly Moran and William Whitford hypothesized

that even if income is held constant, the Internal Revenue Code systematically disfavors the financial interests of blacks. We [i.e., Moran and Whitford] believe that, even at the same incomes, the typical black and the typical white lead different lives, largely as a result of the American history of racial subordination. These different lives, we hypothesize, trigger different tax results.⁵³

Moran and Whitford thus actively embraced the heuristic of horizontal equity in their study.⁵⁴ Cabined in by

51. *Id.* at 201 (emphasis added).

52. Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 751.

53. *Id.* at 757.

54. *See id.* at 753 & n.10; *see also* Beverly I. Moran, *Exploring the Mysteries:*

this concept, Moran and Whitford were confined to considering race only insofar as it affects the enjoyment of tax benefits because of its association with differing patterns of consumption, investment, or participation in the labor market by otherwise similarly-situated individuals.⁵⁵ Thus, horizontal equity ensured that race would be important only if, and to the extent that, it somehow manifested itself in economic transactions.

More troubling, however, was the fact that, especially in their discussion of wealth and home ownership, horizontal equity caused race to be important only when it happened to coincide⁵⁶ with class (i.e., economic) concerns. As described below,⁵⁷ under intersectional theory, it is generally thought that when multiple axes of disadvantage intersect—for example, when race and class intersect in the case of low-income African American men or when race and class and gender intersect in the case of low-income African American women—these multiple axes of disadvantage can produce an effect that is greater than the sum of the separate disadvantages.⁵⁸ In contrast, the concept of tax equity does not allow for the *multiplication* of disadvantages; instead, it works in the opposite direction toward the *reduction* of disadvantages. Thus, for tax equity purposes, race is not considered as a separate axis of disadvantage in addition to class. Rather, race becomes redundant under the concept of tax equity—it is only important to the extent that it coincides with, and serves as a proxy for, economic class.⁵⁹

Can We Ever Know Anything About Race and Tax?, 76 N.C. L. REV. 1629, 1635-36 (1998).

55. Moran & Whitford, *supra* note 52, at 753-55.

56. I have carefully and consciously chosen to use the word “coincide” here rather than “intersect,” because, as described in the next few sentences of the text above, the homogenizing effect of tax equity is much different from the effect of multiple axes of disadvantage described in the literature on intersectionality. See *infra* Part II.B.

57. See *infra* Part II.B.

58. See *infra* note 169.

59. This discussion is in no way meant to imply that class concerns are unimportant—my point throughout this Article is that they are relevant, but by no means the *only* concerns that are relevant when assessing the fairness of a tax. It is worth nothing here that, as we will explore further in Part III.B, even with its professed focus on class concerns, tax equity seems to better serve the interests of those at the top than those at the bottom of the economic ladder.

Let's turn back now to Moran and Whitford's article for an illustration of this effect. Moran and Whitford found that African Americans derive little benefit from the realization requirement, the § 1014 fair market value basis rule, the exclusion for gifts and bequests, and the preferential capital gain rates:

The data on blacks and wealth tells us that blacks own very little wealth and that this lack of wealth is at least partially responsible for the continuing black/white wealth gap. Blacks inherit very little wealth and they do not acquire very much more during their lifetimes. As a consequence, blacks receive very little benefit from the[se] Code sections In particular, blacks are much less likely than whites to own assets, such as stocks and bonds, that benefit from the realization requirement, a necessary prerequisite to benefiting from the stepped up basis at death and a usual prerequisite to benefiting from the favorable capital gains tax rates.⁶⁰

Moran and Whitford found this wealth effect to be less pronounced in the area of homeownership because "many blacks do own homes that appreciate in value";⁶¹ however, "while blacks benefit, whites benefit even more. White homes appreciate more, and hence receive more favorable treatment of gains from investments in homes. Moreover, because white homes are more valuable, on average whites benefit more than blacks from the deductions for home mortgage interest and property taxes."⁶² In each of these passages, race quite clearly counts only because it coincides with economic class: race essentially equals class.⁶³

Throughout the course of their study, Moran and Whitford used the metaphor of a "Black Congress" to suggest ways in which the Code might be changed to better serve "the interests of blacks as a group."⁶⁴ Tellingly, Moran

60. Moran & Whitford, *supra* note 52, at 779.

61. *Id.*

62. *Id.* at 780.

63. See Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755, 802-05 (2005) (describing how academics who consider the racial implications of the earned income tax credit generally proceed on the assumption that "Blacks are disproportionately poor and more likely than Whites to be eligible for the EITC"—in other words, that race equals class).

64. Moran & Whitford, *supra* note 52, at 758.

and Whitford pointedly state in their conclusion that “[a]nyone who wished to shift more of the tax burden away from lower income persons and towards the more wealthy would tend to favor” the changes that their metaphorical Black Congress might make to the Code.⁶⁵

c. *Sanitizing Effect.* Closely related to the homogenizing effect of tax equity is its sanitizing effect on the tax policy debate. Tax equity rids that debate of difficult discussions about race, ethnicity, gender, sexual orientation, disability, and/or other forms of invidious discrimination by forcing those discussions to be carried out in ostensibly “neutral” economic terms. Once again, I will illustrate my point through the medium of examples.

In 1996, Congress amended Code § 104 to exclude from gross income only damages received on account of “physical” injuries or sickness.⁶⁶ Shortly after Congress amended § 104, Karen Brown examined the race-, gender-, and worker-based biases of this amendment, which was intended to make employment discrimination awards taxable.⁶⁷ Brown argued that this amendment stemmed from Congress’ failure to appreciate the (primarily economic) harms caused by job discrimination.⁶⁸ As a result, Brown saw a violation of horizontal equity in this differential treatment of physical and non-physical injuries:

In the service of bias, Congress has enacted a version of section 104(a)(2) that will result in the dissimilar treatment of similarly situated persons, a violation of the widely accepted doctrine of horizontal equity in tax policy analysis. Injured individuals are not treated similarly. Those who are physically harmed may recover all damages awards tax-free. Those injured by employment bias may recover nothing tax-free except reimbursed medical expenses. As demonstrated above, the physical/non-physical dichotomy adopted in amended section 104(a)(2) guarantees disparate and disadvantageous treatment of recoveries for the physical and emotional harms to workers in job bias cases. The disparate

65. *Id.* at 801.

66. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838-39 (codified at I.R.C. § 104 (2000)).

67. Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN’S STUD. 223, 228, 243-49 (1998).

68. *Id.* at 254-55, 268.

treatment may occur, in general, because these types of harms to workers are ignored in the 1996 amendment.⁶⁹

By its very nature, horizontal equity analysis requires a benchmark that can be used for purposes of comparison and contrast. In the context of amended § 104, Brown naturally adopted damages awarded for physical injuries as that benchmark, and her discussion then necessarily centered on consideration of whether the harms caused by denying individuals “equal opportunity to succeed on their jobs as a result of their gender or race”⁷⁰ are as “real” as physical injuries that might impair (or even temporarily or permanently prevent) job performance.⁷¹ Accordingly, for purposes of horizontal equity analysis, race and gender discrimination became relevant only to the extent that their (primarily economic) harm could be quantified and analogized in “neutral” terms to a benchmark with which the mainstream was comfortable.

More to the point, however, is Brown’s argument that employment discrimination awards should be excluded from an employee’s gross income as a reimbursement of an otherwise deductible business expense.⁷² Brown argued that the costs of working in a discriminatory workplace are no less a cost of producing income than any other business expense.⁷³ Yet, while an employee can exclude a reimbursement for purchasing office supplies, she cannot exclude a reimbursement for the costs of working in a discriminatory environment.⁷⁴ Once viewed in this light, the failure to exclude employment discrimination awards from gross income creates something akin to a “parallelism” problem—one that raises vertical, rather than the typical horizontal, equity issues.⁷⁵ The problem lies in the fact that the same payment is treated differently in the hands of the employer than it is in the hands of the employee. In the

69. *Id.* at 260 (footnote omitted).

70. *Id.* at 254.

71. *Id.* at 254-57.

72. *Id.* at 265; see Treas. Reg. § 1.62-2(c)(4) (as amended in 2003).

73. Brown, *supra* note 67, at 261, 264.

74. *Id.* at 263 & n.205.

75. See generally Kahn, *supra* note 7 (discussing parallelism as a horizontal equity issue).

hands of the employer, the payment of an employment discrimination damage award is a deductible business expense under § 162; however, in the hands of the employee, that same payment is included in gross income even though it is really a reimbursement for the costs of working in a discriminatory environment and, therefore, of producing her wage income.⁷⁶ This differential treatment raises a vertical equity (i.e., economic class) issue because it results in the over-taxation of workers and the under-taxation of employers.⁷⁷ It is worth noticing that, through this tax equity analysis, employment discrimination on the basis of race or gender has been transformed into just another “cost” of doing business—a cost the deductibility of which can now be debated in the sanitized jargon of tax expenditures and the comprehensive income tax base.⁷⁸

More recently, Dorothy Brown has used empirical data to disprove the general perception that the earned income tax credit (EITC) disproportionately benefits African Americans.⁷⁹ With the debunking of this myth, Brown has prevailed upon tax policy analysts to devote their attention to the class-based discrimination against low-income children that is embodied in the differences between the terms and implementation of the EITC and those of the child tax credit.⁸⁰ Brown has also advocated disseminating this empirical data regarding the EITC-eligible population as a means of shoring up support for general reform of the credit (particularly to remedy its excessive complexity and to reduce the disproportionate targeting of EITC recipients for audit).⁸¹

In making these arguments, Brown relied upon interest convergence theory and recognized that expurgating race from the tax policy debate (i.e., recasting the debate as primarily or exclusively affecting whites) is the only way to move debate about reforming the EITC forward. For instance, she expressed hope that,

76. See Brown, *supra* note 67, at 264.

77. *Id.*

78. See *id.* at 261-63.

79. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Brown, *supra* note 63.

80. Brown, *supra* note 63, at 763, 765-92.

81. Brown, *supra* note 79, at 827-31.

[o]nce the empirical data is disseminated, tax policy efforts can be marshaled to ensure that low-income children have the same tax advantages available to middle-income children. EITC reform is necessary to assist all low-income families, especially if it is discovered that they are being treated separately and unequally under the tax laws because of erroneous perceptions held by policymakers about their race.⁸²

Or, as she has also put it, “[o]nce the low-income taxpayer credit is ‘properly’ raced, and viewed as primarily benefiting whites,”⁸³ we will be able to see “how taking account of race can help us move past it and help low-income taxpayers regardless of race.”⁸⁴ In either case, Brown’s hope stems from the possibility of sanitizing the tax policy debate by shifting the focus away from racial stigma and toward what appear to be purely class-based concerns.

d. *Screening Function.* Tax equity, through its homogenization of individuals and sanitization of the tax policy debate, also serves an important screening function. Merely framing a critical discussion in tax equity terms can often scuttle an attempt to raise and address concerns relating to race, ethnicity, gender, sexual orientation, disability, and/or other non-economic characteristics. For example, discussions of the tax treatment of same-sex couples normally approach the question either explicitly or implicitly from a horizontal equity perspective.⁸⁵ Typically, these articles contrast the tax treatment of same-sex couples with that of different-sex married couples and argue that, for the sake of “full tax equity,” same-sex couples should be put on “equal footing” with different-sex married couples.⁸⁶

82. Brown, *supra* note 63, at 763 (footnote omitted).

83. Brown, *supra* note 79, at 799.

84. *Id.*

85. *E.g.*, Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 678 (2000); Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as Are Currently Granted to Married Couples?: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41 (1998); Jonathan Brophy, Comment, *Death Is Certain, Are Taxes?: Another Argument for Equality for Same-Sex Couples Under the Code*, 34 SW. U. L. REV. 635, 646-53 (2005).

86. Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 TUL.

In her work, Patricia Cain has contended that same-sex couples are similarly situated to different-sex married couples for tax purposes because they "consider themselves just as committed as married couples and [their] household is just as much a single economic unit."⁸⁷ In the context of a critique of the estate tax from a lesbian and gay perspective, Cain put the point even more forcefully:

Based on a recent scholarly survey of unmarried couples, it is fair to conclude that same-sex couples share ownership of assets at a much higher rate than opposite-sex unmarried couples. The result is not surprising. Married couples are more likely to share ownership of assets than any other group. Since same-sex couples cannot marry even though they may want to, that group is likely to include couples who are more committed than unmarried opposite-sex couples, all of whom have elected against marriage. Thus the joint ownership habits amongst couples who want to get married, but cannot, should be closer demographically to the joint ownership experiences and desires of married couples.

The stories I have presented in this section reveal themes of commitment, financial interdependence, joint ownership, and sharing of responsibilities, both personal and financial. They are consistent with the surveys that show a significant number of gay and lesbian couples favor the pooling of both income and assets. The stories also show that attitudes about money may affect how individual partners manage their financial affairs or contribute to joint ownership. But, in the end, the stories support the concept that lesbian and gay couples are economic units that function to improve the lives of the individual partners through a system based on tacit understanding, trust, and financial interdependence.⁸⁸

Seen through the prism of horizontal equity, this argument is not really about sexual orientation discrimination, but about determining the appropriate taxable unit and then applying that definition uniformly.⁸⁹ And, further evidencing horizontal equity's inflexibly economic approach to determining when taxpayers are similarly situated, the argument is not that same-sex couples are an appropriate taxable unit because they are exactly like married, different-sex couples in every respect

J.L. & SEXUALITY 97, 100, 131 (1991).

87. *Id.* at 130-31.

88. Cain, *supra* note 85, at 689-90 (footnotes omitted).

89. See Cain, *supra* note 86, at 100.

(notwithstanding the passing references to personal commitment and sharing of responsibilities), but rather that same-sex couples are an appropriate taxable unit because they appear to have the same propensity as married, different-sex couples to act as a single economic unit. When the focus is shifted from the social category of couples and their commitments to each other to the economic category of single "units," the definition of the appropriate taxable unit cannot be confined to committed couples, whether same-sex or different-sex, but will logically apply to any group of individuals, however large or small, so long as they pool their finances.⁹⁰ Severed from its roots, the question is no longer one of social justice, but one of economic groupings of people and the need to achieve parity between those groupings.

To more fully illustrate this point, let's briefly consider Cain's article critiquing the estate tax from a lesbian and gay perspective. In that article, Cain put forth seven different proposals for reforming the estate tax to address the inequitable treatment of same-sex couples.⁹¹ At the same time, Cain hoped that her proposals might arrive at a more realistic estate tax treatment of families (i.e., one that avoids the extremes of (1) treating everyone who is married as a single economic unit regardless of the extent to which they actually blend their finances and (2) treating everyone who is unmarried as an individual regardless of the extent to which they actually blend their finances with others). Cain's proposals included, among others, repealing the estate tax, raising the estate tax exemption, treating same-sex couples the same as married couples for tax purposes, and imposing the estate tax only once each generation. Yet, she described her last proposal—the creation of a "personal tax partnership"—as perhaps the fairest of all.⁹² Under this proposal, any two persons who wished to commingle their finances could form a "personal tax partnership" that would

90. See also Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1551 (2006) (advocating the extension of income-splitting to all couples that act as a single economic unit, regardless of whether they are married and regardless of whether the members of the couple are of the same or different sexes, but admitting that, "[a]s a matter of tax policy, there is no reason to limit the economic unity option to pairs").

91. Cain, *supra* note 85, at 701-07.

92. *Id.* at 707.

permit them to transfer property to each other free of estate tax upon the termination of the partnership (i.e., at the death of one of the partners).⁹³ Cain found it difficult, however, to justify imposing any limits on the persons who could create such a partnership:

A primary initial issue is how to limit the use of such arrangements. For example, who should be permitted to create such tax partnerships and should they be limited to two persons? Should we, for example, only allow intimate committed partners? Or, should we allow siblings or other family members to form such partnerships? If the driving principle is shared property, why limit the partnership to two persons?⁹⁴

Struggling with the need to stave off possible abuse, Cain entertained the possibility of imposing a cohabitation requirement and/or a generational requirement on their formation.⁹⁵ She also affirmatively decided to limit her proposal to two-person partnerships in order to make it "workable."⁹⁶ Nonetheless, whatever the results, it is Cain's struggle itself that concerns us. Although her immediate focus was on remedying the estate tax problems faced by same-sex couples and her secondary focus was on arriving at an appropriate estate tax treatment for families, Cain was unable to address her proposal to the needs of either committed couples or families because tax equity's blinkered focus on economic circumstances made any attempt to confine the proposal to these groups arbitrary and indefensible. Even attempts to draw the proposal narrowly enough to avoid blatant abuse of the Code were rendered difficult, if not impossible, by the logical need to achieve economic parity for all. In the end, the proposal became unwieldy and unworkable because Cain and tax equity were working at cross-purposes: she in a good faith attempt to achieve "substantive justice"⁹⁷ for same-sex couples, and it in an attempt to scuttle talk of justice with an unbending focus on economics.

93. *Id.* at 704-07.

94. *Id.* at 705.

95. *Id.* at 706.

96. *Id.* at 705.

97. *Id.* at 678.

3. . . . and in the *Comments of Its Critics*. A 1998 symposium issue of the *North Carolina Law Review* collects a number of pieces critiquing applications of critical tax theory.⁹⁸ Many of these critiques lay bare the effects of tax equity's economic approach to fairness.⁹⁹ In these critiques, one can detect the homogenizing and sanitizing effects of tax equity, view its screening function at work, and once again watch equity swallowed up by notions of efficiency.

In his lead article for the symposium, Lawrence Zelenak critiqued Moran and Whitford's choice of a comprehensive income tax base as a starting point for analyzing whether the Code is biased against African Americans.¹⁰⁰ He argued that, given the hybrid income-consumption tax that we actually have, one could just as easily choose a consumption tax as the baseline for analysis. Zelenak then asserted that, were they to consider our current system's deviations from a consumption tax baseline, Moran and Whitford would be bound to conclude that our tax system is biased against whites because investment income is "almost certainly" realized disproportionately by whites and our current system's taxation of such income is a suspect deviation from a consumption tax baseline.¹⁰¹ Having embraced the homogenizing effects of tax equity (i.e., having essentially equated race with economic class), Zelenak declared a stalemate:

My view is that it makes no sense to search the Code for hidden racial bias from either starting point. The arguments between income tax and consumption tax proponents are close to a standoff, both intellectually and politically. Given that standoff, there is no reason to privilege either extreme position as the proper starting point in a search for hidden discrimination. Without a good reason to start from either extreme, there is no reason to accuse the actual hybrid tax of discrimination against

98. Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C. L. REV. 1519 (1998).

99. See Brown, *supra* note 63, at 808-10.

100. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1563-66 (1998).

101. *Id.* at 1565.

any race.¹⁰²

Not content with this economic tit-for-tat, Zelenak bolstered his argument for screening race out of the tax policy debate by asserting that anyone attempting to achieve the best possible real world tax system might combine aspects of an income and a consumption tax to create what he referred to as a "normative" tax base.¹⁰³ In this hypothetical world, the baseline would be the normative tax base (rather than a purely income or consumption tax base). For any given provision, "[e]ither the provision is normative, or it is not. If the provision is right, it makes no sense to examine it for racial bias relative to some alternative wrong approach. If the provision is wrong, it should be repealed regardless of its racial effects."¹⁰⁴ According to Zelenak, "[t]he cold logic of those two possibilities indicates there is never a reason to examine a provision for racial effects."¹⁰⁵ This logic certainly leaves me cold. It sounds as if there is no place for race in tax policy analysis because whatever tax system the (white) majority creates is presumptively the correct system, unless and until the (white) majority decides that they were mistaken in some respect.

In his contribution to the symposium issue, Richard Schmalbeck also commented on Moran and Whitford's article. However sympathetic Schmalbeck's critique might be, it is quite clear that his thinking was thoroughly influenced by the homogenizing effect of tax equity:

In fact, when I first read the article, my mind was headed down a track quite different from the authors', which I can summarize with the following competing chain of observations: (a) *by far the most salient socioeconomic characteristic for purposes of assessing income tax burdens is income itself*; (b) *African-Americans are dramatically underrepresented in high- and middle-income groups and overrepresented in the lowest income groups*; (c) *our personal income tax, whatever its faults, is in the end significantly*

102. *Id.*

103. *Id.* at 1566-67.

104. *Id.* at 1567.

105. *Id.* But even Zelenak would not go quite that far; he would allow arguments based on race to be used in the political arena "to overcome legislative inertia." *Id.*

*progressive; from which it follows that (d) despite the details of the tax situations Moran and Whitford analyze, the bottom-line arithmetic of tax burdens must surely and substantially favor African-Americans.*¹⁰⁶

And just a few pages later, Schmalbeck considered the possibility that both Moran and Whitford's horizontal equity critique of the income tax and his vertical equity response (quoted immediately above) might be correct:

Surely African-Americans—like any other taxpayers—are entitled to a tax system that reasonably satisfies both standards of equity [i.e., horizontal and vertical]. From an overall policy perspective, it is entirely appropriate to say that both forms of equity are essential and that achievement of one sort of equity is never an adequate substitute for the highest practicable achievement of the other. To put it more concretely in terms of this debate, the prevailing sense of vertical equity appears to reflect the view that low-income taxpayers should hardly be subject to the income tax at all and that middle-income taxpayers should be subject only to relatively light taxation. This is a policy that is presumably not influenced to any significant degree by considerations of race. *If African-Americans turn out to be the beneficiaries of such a view, it is because they are relatively poor, not because they are black.* It remains true that, to the degree that African-Americans do rise above the lower ranks of the economy, they are entitled to the benefits of horizontally equitable tax laws.¹⁰⁷

James Bryce approached Moran and Whitford's analysis from a far less charitable position. Also embracing the construct that race equals class, Bryce turned vertical equity into a sword when he argued that, at best, Moran and Whitford had

discovered a few tiny truths at the cost of overlooking the giant truth: The Code discriminates against whites. The progressive rate structure results in whites paying most of the federal income tax. This discrimination has increased in recent years as Congress has added a complex tangle of phase-outs to the Code explicitly to deprive high-income taxpayers, who are predominantly white, of various benefits.¹⁰⁸

106. Schmalbeck, *supra* note 12, at 1818 (emphasis added).

107. *Id.* at 1820-21 (emphasis added).

108. James D. Bryce, *A Critical Evaluation of the Tax Critics*, 76 N.C. L. REV.

Bryce asserted that Moran and Whitford would be far better off if they got “straight to the point and argue[d] that the existing rate structure is insufficiently progressive and that the Code discriminates against blacks (and other low-income groups) by not taking much more of the income of high-income (disproportionately white) taxpayers for redistribution.”¹⁰⁹

In his contribution to the symposium, Steve Johnson found appeals to the “classical liberal value of equality”—for example, arguments that, on principle, same-sex couples should be treated the same as different-sex couples—to be wanting.¹¹⁰ In its place, Johnson articulated a clearly economic test of horizontal equity. Johnson argued that, for a claim of discrimination to be “fully persuasive,” a critical tax scholar must show that

(1) There is some particular Code feature that operates to the substantial disadvantage of some group. Typically, this would involve showing that, as a result of the Code feature, group members pay proportionately more tax than non-members.

(2) The offending Code feature is not compensated for by other aspects of the Code that disproportionately benefit the group in question. That is, there must be an on-balance or on-net evaluation, a showing that the unfavorable Code aspects hurt group members more than the favorable Code aspects help them.

(3) The appropriate way to redress the problem would be changing the Code, rather than changing non-tax rules or practices.

(4) A reasonable solution exists. That is, a way exists to reform the offending Code section, and that way is technically feasible, efficacious, and unlikely to create other serious problems.¹¹¹

After measuring two articles on the tax treatment of same-sex couples against this standard, Johnson concluded that “scholars and advocates have not yet convincingly demonstrated that, on net, the failure to recognize same-sex

1687, 1689 (1998).

109. *Id.* at 1691.

110. Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1773-74 (1998).

111. *Id.* at 1771-72.

couples as married hurts them by imposing substantially higher federal income tax liabilities on them.”¹¹² Johnson thus provides us with another example of how efficiency (in the guise of a cost-benefit analysis) subsumes equity.¹¹³

Perhaps most to the point in demonstrating how plainly inhospitable traditional tax analysis is to critical perspectives, Charles Galvin maintains in his succinct contribution to the symposium issue that

[a] tax system should be neutral in its effect on each citizen's decisionmaking. Therefore, assuming a democratic ideal of a free society with equal opportunity for all, the framers of tax policy should strive for a system that is blind as to gender and color. I agree with Professor Zelenak that any attempt to tailor the system to meet the criticisms of feminists or racial groups rapidly becomes a nightmare of dilemmas that are just not resolvable. One needs only to observe lifestyles of friends, colleagues, neighbors, and relatives, and one becomes keenly aware that to design a tax regime to meet the gender and race considerations of each case would create a statutory maze of confusion many times worse confounded than the current system. Furthermore, trade-offs between different feminist goals make simple solutions impossible. A better course is to achieve neutrality by the attainment as nearly as possible of a pure Haig-Simons comprehensive model or a pure consumed income model.¹¹⁴

To paraphrase Galvin's article: Taking the reality of invidious discrimination into account makes tax policy analysis far too complicated and messy. Tax policy analysis is much simpler and tidier when the possibility of discrimination is flatly ignored, when we assume that the real and ideal are one and the same, and when we focus only on the economic aspects of taxation with which we are far more comfortable.

112. *Id.* at 1779.

113. See *supra* text accompanying notes 33-35; see also Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 *passim* (2004) (discussing how, by focusing on a purely quantitative measure of fairness, Johnson misses much of the discrimination against same-sex couples embodied in the Code).

114. Charles O. Galvin, *Taking Critical Tax Theory Seriously—A Comment*, 76 N.C. L. REV. 1749, 1749 (1998) (footnote omitted).

II. ANTICIPATING THE INEVITABLE CRITIQUES

Being an eternal optimist (a trait that I happily share with most tax lawyers),¹¹⁵ I trust that, by now, you have accepted my basic point that the concept of tax equity has quietly shaped the tax policy debate through its unerring focus on income, creating an environment that is hostile to the contributions of critical tax scholars. Realistically, however, I do anticipate some resistance to this rethinking of a core concept.¹¹⁶ In this Part, I attempt to anticipate and counter some of those critiques.

A. *A Tax on Income?*

An initial reaction to my argument might be that the income tax is, after all, a tax on "income." It is, therefore, both necessary and appropriate to maintain a narrow focus on taxpayers' relative incomes in determining the tax's fairness. Correlatively, considerations of race, ethnicity, gender, sexual orientation, disability, and/or other non-economic characteristics simply have no place in assessing the fairness of an income tax.¹¹⁷ The short answer to this critique reiterates a point made in passing in the introduction to this Article; namely, that the income tax is

115. Speaking of the tax jargon used to describe the application of § 1014 to property acquired through inheritance, Bittker and Lokken note that, "being perennial optimists, tax practitioners typically accentuate the positive by using 'stepped-up basis' as a generic label, whether the property has gone up or down in value." 2 BITTKER & LOKKEN, *supra* note 24, ¶ 41.4.1.

116. The inclusion of equity among the guiding principles of tax policymaking has been traced at least as far back as the eighteenth century. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 777 (Edwin Cannan ed., Modern Library 1937) (1776); see also Barker, *supra* note 4, at 8; Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 294 (2001).

117. See, e.g., MURPHY & NAGEL, *supra* note 4, at 39 ("Some forms of discrimination among taxpayers will count as unjust even if they do serve other legitimate goals. The familiar suspect categories of race, sex, sexuality, and religion come to mind."); *id.* at 170 ("A modern tax system cannot hope to be neutral in its incentive effects with regard to people's economically significant decisions about work, leisure, consumption, ownership, and form of life. If there are requirements of neutrality, they must be rather special and related to fundamental matters like sex, race, or religion."); Martinez, *supra* note 4, at 441 ("There are immutable characteristics that deserve protection, for example, differential taxation based on race would not be accepted.").

far more than just a tax on income. As one commentator has nicely put it, "tax policy is one of the most telling indicators of the nation's true moral compass" ¹¹⁸

For most of their history, the individual and corporate income taxes have been the single largest source of revenue for the federal government. ¹¹⁹ Of the two, since 1944, the individual income tax has consistently brought in more of that revenue. ¹²⁰ Indeed, since 2000, the individual income tax has, by itself, raised between 43% and 49.9% of the federal government's total revenue. ¹²¹

As the most important source of federal revenue, the individual income tax is the primary and most visible means of attempting a fair allocation of the burden of funding our government and paying for public services. ¹²² For this reason, it is generally accepted that the truly poor should be completely exempted from tax, even if they have "income." ¹²³ In addition, those who are perceived as lessening the need for government action or the demand for public services are often afforded a corresponding reduction in their income taxes. For example, taxpayers are allowed a deduction for contributions made to charitable organizations. ¹²⁴ As early as 1938, Congress justified this deduction on the ground that it reduces government spending:

118. Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 747 (2006).

119. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2008: HISTORICAL TABLES 6 (2007) (indicating that income taxes accounted for 60% of the federal government's receipts by 1930, that this figure rose to a high of nearly 80% during World War II, and that the figure has more recently hovered between 53% and 58%).

120. *Id.* at 29-30 tbl.2.1.

121. *Id.*

122. See MURPHY & NAGEL, *supra* note 4, at 3; McCaffery, *supra* note 11, at 830; see also Edward J. McCaffery, *Cognitive Theory and Tax*, in BEHAVIORAL LAW AND ECONOMICS 398, 417-19 (Cass R. Sunstein ed., 2000) (discussing the cognitive impact of the "prominence" of income taxes); Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555, 589 (2002) (describing the income tax as "the most visible tax").

123. See Lipman, *supra* note 11, at 36, 49; Staudt, *supra* note 6, at 922; Staudt, *supra* note 122, at 585.

124. I.R.C. § 170 (2000).

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.¹²⁵

More deliberately, the federal government has gradually moved away from directly providing subsidized rental housing to low-income households.¹²⁶ To fill this gap in social services, Congress created the low-income housing tax credit¹²⁷ to provide private developers with a financial incentive to develop and rehabilitate affordable housing for low-income tenants.¹²⁸ The same type of gap-filling can be seen in the federal government's efforts to promote retirement income security: "[T]he broad framework in the United States for pursuing the goal of retirement income security is a tripartite system often analogized to a three-legged stool. The three 'legs' are Social Security, private employer-sponsored pension plans, and personal savings."¹²⁹ Congress has included a number of provisions in the Code that encourage individuals to save money on their own and to encourage employers to offer—and employees to participate in—retirement saving plans.¹³⁰ By encouraging

125. H.R. REP. NO. 75-1860, at 19 (1938), *reprinted in* 1939-1 C.B. (pt. 2) 728, 742.

126. See Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 212 (2003).

127. I.R.C. § 42 (2000).

128. See *id.*

129. John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159, 176 (2004); see also *id.* at 177 ("Conceptually, commentators and policymakers evaluate the attainment of this retirement income security objective by reference to two related criteria: (1) ensuring a basic standard of living upon retirement; and (2) facilitating some added degree of lifestyle maintenance upon retirement."); SOC. SEC. ADMIN., YOUR SOCIAL SECURITY STATEMENT 1 (2007), <http://www.ssa.gov/mystatement/sample1.htm> (text of sample statement sent out to beneficiaries) ("Social Security is the largest source of income for most elderly Americans today, but Social Security was never intended to be your only source of income when you retire. You also will need other savings, investments, pensions or retirement accounts to make sure you have enough money to live comfortably when you retire.").

130. See, e.g., I.R.C. §§ 219, 401-420 (2000).

private saving, Congress is able to "reduce[] the need for public assistance and reduce[] pressure on the Social Security system."¹³¹ Even tax assistance for the promotion of adoption¹³² has been tied to the reduction of government spending:

What does an adoption tax credit have to do with welfare reform? Frankly, not much, Mr. President, if we are discussing our current welfare system, but a great deal, I think, if we are discussing a dramatically reformed system. Then we want innovation and creativity. The current welfare system has created a dependence on Federal programs while the envisioned system encourages independence. Welfare spending has been growing at an alarming pace, but so has the number of children living in poverty, and so has the number of children who need families.

Providing a future for these children by uniting them with loving families who can provide not only their financial welfare but also their emotional welfare has to be a goal of this Congress. As we move toward a system that promotes greater strength in the American family, we ought to encourage efforts like this by using the adoption tax credit.¹³³

Similarly, tax relief is provided to individuals who engage in activities that advance the national welfare and, incidentally, reduce the need for future government spending or the provision of public services. For example, the web of tax deductions, credits, and tax-favored accounts for education¹³⁴ have been justified on the ground that "our Nation's economic success—our very future—will depend on a highly educated and high-skilled labor force."¹³⁵ Moreover,

131. STAFF OF JOINT COMM. ON TAX'N, PUBL'N NO. JCX-16-99, OVERVIEW OF PRESENT-LAW TAX RULES AND ISSUES RELATING TO EMPLOYER-SPONSORED RETIREMENT PLANS 4 (1999); see also Carol Moseley-Braun, *Women's Retirement Security*, 4 ELDER L.J. 493, 495 (1996) ("The widening income gap occasioned and influenced by pension inequities shows up as an increased demand for transfer payments and public support.").

132. See I.R.C. §§ 23, 137 (2000).

133. 142 CONG. REC. S8363 (July 19, 1996) (statement of Sen. Craig).

134. See, e.g., I.R.C. §§ 25A, 221, 222, 529, 530 (2000).

135. 143 CONG. REC. S9715 (Sept. 19, 1997) (statement of Sen. Murkowski); see also 143 CONG. REC. S8399 (July 31, 1997) (statement of Sen. Jeffords) ("This agreement also recognizes the critical relationship between education and our national economic well-being. In a day and age beset by downsizing, when job skills are constantly becoming outmoded by technological advances

"higher education results in lower unemployment, and lessens the need for unemployment compensation and public funding of health care."¹³⁶ Likewise, when the deduction for personal interest was eliminated in 1986, Congress retained the deduction for home mortgage interest on the ground that it encourages homeownership.¹³⁷ Roberta Mann has summarized the benefits associated with homeownership—including some that clearly impact future government spending—that might have motivated Congress' retention of this deduction:

Homeowners have been found to be more likely to vote in local elections and work to solve local problems. This "homeowner activism" creates a better community for all residents. Arguably, homeowners are better citizens than renters, and thus wider home ownership creates economic and political stability. Department of Housing and Urban Development ("HUD") Secretary, Andrew Cuomo, stated in a recent press release: "Home ownership has many benefits. Homeowners generally enjoy better living conditions than renters; accumulate wealth as their investment in their homes grows; strengthen the economy by purchases of homes, furniture and appliances; and tend to be more involved in promoting strong neighborhoods and good schools than renters." Homeowners also maintain their homes in better condition than renters, increasing values in the neighborhood as a whole and saving society's resources by extending the life of housing. In a broader sense, private home ownership arguably benefits the environment. Homeowners are likely to be more concerned than renters about pollution and toxic waste, and thus more likely to take action to protect their environment.¹³⁸

and break-throughs in learning, education will be a lifetime endeavor. I am happy that the bill recognizes this, and makes lifetime learning more easily affordable."); Natasha Mulleneaux, *The Failure to Provide Adequate Higher Education Tax Incentives for Lower-Income Individuals*, 14 AKRON TAX J. 27, 28-29 (1999) ("Although educational authority rests with the states, the federal government encourages and specifically assists educational activities that are considered in the national interest. The promotion and financial assistance of higher education is clearly in the national interest, as higher education (1) increases the nation's productivity and wealth, (2) assists in social progress and (3) increases the prosperity of individuals." (footnotes omitted)).

136. Mulleneaux, *supra* note 135, at 30.

137. See STAFF OF JOINT COMM. ON TAX'N, PUBL'N NO. JCS-10-87, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 263-64 (1987).

138. Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1354-55 (2000) (footnotes omitted).

These are but a small subset of the numerous provisions in the Code that arguably have little, if anything, to do with taxing "income." In the 1960s, Stanley Surrey dubbed such provisions "tax expenditures."¹³⁹ Surrey argued that the income tax can actually be split into two distinct parts: (1) the structural provisions of the tax, which "include both the normative provisions of an income tax (i.e., items that would 'be treated in much the same way by any group of tax experts building the structure of an income tax') and the provisions that, even though not normative, are necessary to build an income tax";¹⁴⁰ and (2) the tax preferences or penalties, which "depart from the normative tax structure . . . [and] either . . . provid[e] governmental assistance to taxpayers by reducing their normative tax burden or . . . exact[] a penalty from taxpayers by increasing their normative tax burden."¹⁴¹ Surrey maintained that the tax preferences and penalties in the Code are actually not tax provisions at all, but merely disguised direct expenditure programs and penalties:

Under tax expenditure analysis, each taxpayer can be viewed as paying to the government the tax due under the normative income tax. Then, taxpayers who are entitled to tax preferences can be viewed as having received a payment from the government equal to the amount of the preference, and taxpayers who are subject to tax penalties can be viewed as having been required to make an additional payment to the government equal to the amount of the penalty. In the case of tax preferences, these two payments are, in practice, simply netted out for the sake of expediency (i.e., the tax payment from the taxpayer is simply reduced by the amount that the government owes the taxpayer). Thus, under tax expenditure analysis, tax preferences and penalties are the equivalent of direct expenditure programs and penalties, respectively.¹⁴²

Although tax expenditure analysis is not without its detractors,¹⁴³ Surrey proved quite persuasive in making the

139. *Infanti*, *supra* note 17, at 717.

140. *Id.* at 720 (footnotes omitted) (quoting STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 17 (1973)).

141. *Id.* at 721.

142. *Id.* at 721-22 (citing STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985); STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (1973)).

143. *See id.* at 736-44.

case that bifurcating the income tax between structural provisions and tax preferences and penalties would improve budgetary and tax policymaking. In fact, since 1974, Congress has mandated the preparation of a tax expenditure budget as part of the annual budget process.¹⁴⁴ Yet, despite its explicit adoption of tax expenditure analysis, Congress has not exactly rushed to eradicate tax preferences and penalties from the Code. The Joint Committee on Taxation's estimate of tax expenditures for 2006–2010 includes a list of tax expenditures (categorized by subject, not Code section) that goes on for some twelve pages.¹⁴⁵ And the President's fiscal year 2008 budget proposal contains a list of no less than 161 tax expenditure provisions.¹⁴⁶ In view of the dogged persistence of tax expenditures, the argument that the income tax is no more than a tax on "income"—and, therefore, appropriately focuses on "income" as the sole criterion of its "equitableness"—completely lacks the power to persuade.

B. *Income as a Proxy for Discrimination*

Alternatively, one might argue that income is an appropriate criterion for measuring tax equity because discrimination on the basis of race, ethnicity, gender, and sexual orientation all appear to adversely impact wages, which are the largest component of individual adjusted gross income under the income tax and compose the entire tax base for the Social Security and Medicare payroll taxes.¹⁴⁷ For instance, it is well known that the earnings of

144. *Id.* at 718.

145. STAFF OF JOINT COMM. ON TAX'N, PUBL'N NO. JCS-2-06, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2006-2010, at 30-41 (2006).

146. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2008, at 287-90 (2007).

147. See I.R.C. §§ 3101, 3121(a) (2000); Brian Balkovic, Internal Revenue Serv., *Individual Income Tax Returns, Preliminary Data, 2005*, STAT. INCOME BULL., Winter 2007, at 11, <http://www.irs.gov/pub/irs-soi/05inplim.pdf>; Michael Parisi & Scott Hollenbeck, Internal Revenue Serv., *Individual Income Tax Returns, 2004*, STAT. INCOME BULL., Fall 2006, at 8, <http://www.irs.gov/pub/irs-soi/04indtr.pdf>; see also Irene Browne & Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. SOC. 487, 495 (2003) ("Indeed, the gap in wages between groups is such a well-recognized summary measure of the extent of inequality that 1970s feminist activists wore buttons that simply read

women are only a fraction of those of men¹⁴⁸ and that the earnings of African Americans and Latino/as are well below those of whites.¹⁴⁹ And, contrary to the stereotype of gay men as economically privileged, studies have repeatedly shown that gay men actually earn lower wages than heterosexual men.¹⁵⁰ Furthermore, individuals with

‘59¢.’”).

148. See RENEE E. SPRAGGINS, U.S. DEP’T OF COMMERCE, *WE THE PEOPLE: WOMEN AND MEN IN THE UNITED STATES: CENSUS 2000 SPECIAL REPORTS 12* (2005) (“In 1999, the median earnings of women 16 and over who worked full-time, year-round were \$27,200, about \$10,000 less than the median earnings of their male counterparts (\$37,100).”); BRUCE H. WEBSTER, JR. & ALEMAYEHU BISHAW, U.S. DEP’T OF COMMERCE, *INCOME, EARNINGS, AND POVERTY DATA FROM THE 2005 AMERICAN COMMUNITY SURVEY 8* (2006) (indicating that, for a period of twelve months ending in 2005, the median earnings of women were only 76.7% of those of men). Although the gender pay gap has narrowed substantially over time, the pace of that narrowing slowed in the 1990s. Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence*, 60 INDUS. & LAB. REL. REV. 45, 45 (2006) (pointing to census data indicating that, from 1979 to 1989, the gender pay gap experienced a 9 percentage point narrowing, from 59.7% to 68.7%, and that, from 1989 to 1999, the gender pay gap experienced only a 3.5 percentage point narrowing, from 68.7% to 72.2%). Some have argued that closing the wage gap may not signal the achievement of “genuine equality for women”; specifically, McCaffery has attempted to “show how the gender gap might narrow, without undermining . . . gender injustice.” MCCAFFERY, *supra* note 37, at 234; *see also id.* at 234-66 (explaining this point at length). *See generally* Doris Weichselbaumer & Rudolf Winter-Ebmer, *Rhetoric in Economic Research: The Case of Gender Wage Differentials*, 45 INDUS. REL. 416 (2006) (studying the use of rhetoric by economists in explaining whether the gender wage gap is due to discrimination or other factors).

149. *See* SPRAGGINS, *supra* note 148, at 12 fig.11 (indicating that, for 1999, the median earnings of African American and Hispanic men (\$30,000 and \$25,400, respectively) were well below those of white men (\$39,235), while those of African American and Hispanic women (\$25,589 and \$21,634, respectively) were below those of white women (\$27,878)); WEBSTER & BISHAW, *supra* note 148, at 11 tbl.5 (indicating that, for a period of twelve months ending in 2005, the median earnings of African American and Hispanic men (\$34,433 and \$27,380, respectively) were well below those of white men (\$46,807), while those of African American and Hispanic women (\$29,588 and \$24,451, respectively) were well below those of white women (\$34,190)).

150. *E.g.*, Sylvia A. Allegretto & Michelle M. Arthur, *An Empirical Analysis of Homosexual/Heterosexual Male Earnings Differentials: Unmarried and Equal?*, 54 INDUS. & LAB. REL. REV. 631, 631, 644 (2001); Nathan Berg & Donald Lien, *Measuring the Effect of Sexual Orientation on Income: Evidence of Discrimination?*, 20 CONTEMP. ECON. POL’Y 394, 411 (2002); Dan A. Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449, 463 (2003); John M. Blandford, *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 INDUS. & LAB. REL. REV. 622, 628 (2003); Christopher S. Carpenter, *Revisiting the Income Penalty for Behaviorally Gay*

disabilities are more likely than those without disabilities either to be living in poverty or to be low-income.¹⁵¹ So, why complain that the use of income to gauge tax equity ignores non-economic lines of similarity and difference if income actually serves as a proxy for invidious discrimination along those lines?

The problem with this argument is that income serves, at best, as a partial and incomplete proxy for discrimination and, at worst, as a highly misleading one. Mention of Asian Americans was noticeably absent from the examples in the previous paragraph of earnings gaps that are attributed to the effects of discrimination. Although the earnings of African Americans and Latino/as are lower than those of whites, the earnings of Asian Americans exceed those of whites.¹⁵² Looked at in isolation, these income statistics might (incorrectly) lead one to believe that Asian Americans suffer no discrimination at all in the United States; however, Mylinh Uy has explained the multitude of reasons why income statistics paint a picture of Asian American

Men: Evidence from NHANES III, 14 LAB. ECON. 25, 29-32 (2007); see also M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 20-51 (2001) (Badgett's method of identifying lesbians and gay men in her study has been critiqued by both Black et al., *supra*, at 453-56, and Blandford, *supra*, at 625-26; this study was originally published as M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726 (1995)).

151. See ERIKA STEINMETZ, U.S. DEP'T OF COMMERCE, AMERICANS WITH DISABILITIES: 2002, at 8-9 (2006) (all figures relate to individuals age 25-64). With regard to the lower-income range, 39.3% of those without disabilities reported income less than \$20,000 and 12.3% of them lived in a household with total household income below \$20,000. *Id.* In comparison, 47.6% of those with a non-severe disability had income less than \$20,000 and 18.3% of them lived in a household with total household income below \$20,000, while 76.6% percent of those with a severe disability had income below \$20,000 and 37.8% of them lived in a household with total household income below \$20,000. *Id.* at 9. Fully one quarter (25.9%) of those with a severe disability were living in poverty, while 11.2% of those with a non-severe disability and only 7.7% of those without a disability were living in poverty. *Id.*

152. SPRAGGINS, *supra* note 148, at 12 fig.11 (indicating that, for 1999, the earnings of Asian American men were \$40,650 and those of white men were \$39,235, while the earnings of Asian American women were \$31,049 and those of white women were \$27,878); WEBSTER & BISHAW, *supra* note 148, at 11 tbl.5 (indicating that, for a period of twelve months ending in 2005, the earnings of Asian American men were \$48,693 and those of white men were \$46,807, while the earnings of Asian American women were \$37,792 and those of white women were \$34,190).

experience that is both coarse and misleading.¹⁵³

Despite the inclusion of individuals with disabilities in the list of examples of earnings gaps above, there is some question about whether income actually serves as an accurate proxy for disability discrimination. In 1990, Congress enacted the Americans with Disabilities Act (ADA) to redress discrimination (including employment discrimination) against individuals with disabilities in order to help them to achieve economic self-sufficiency.¹⁵⁴ Whether the ADA has had a positive or negative effect on the economic circumstances of individuals with disabilities has been the subject of serious scholarly debate. For example, based on economic modeling, one scholar predicted that the ADA's requirement that covered employers make "reasonable accommodations" for disabled employees would "increase or leave unchanged the relative wages of disabled workers while decreasing their relative employment levels."¹⁵⁵ Two empirical studies of wage and employment rates of individuals with disabilities before and after the ADA's enactment appear to bear out this prediction that the ADA may actually have worsened—and not ameliorated—the economic circumstances of individuals with disabilities.¹⁵⁶ However, other studies contradict these findings by suggesting that "those likely to be considered disabled under the ADA . . . improved their relative employment levels in the early 1990s."¹⁵⁷ The conflicting results of these studies—as well as shortcomings in their

153. Mylinh Uy, Note, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117, 129-36 (2004).

154. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(6), (a)(8), (b)(2), 104 Stat. 327, 328-29 (codified at 42 U.S.C. § 12101) (indicating that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally"; setting forth "equality of opportunity, full participation, independent living, and economic self-sufficiency" as proper national goals for individuals with disabilities; and further stating that one of the purposes of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities").

155. Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 275 (2000).

156. See *id.* at 276-78.

157. Peter Blanck et al., *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267, 268 (2003).

design—have led some commentators to conclude that the research on the ADA's "impact on the employment prospects and economic independence of individuals with disabilities" is "inconclusive."¹⁵⁸

Even setting aside the possibility that the federal government's own efforts to curb disability discrimination may have actually harmed individuals with disabilities—and, for our purposes, may therefore have limited the viability of using income as a proxy for disability discrimination—the income tax may do a less than adequate job of taking disability into account in arriving at an appropriate net "income" on which tax should be levied. It has been argued that the additional standard deduction for the blind¹⁵⁹ singles them out for special treatment and discriminates against individuals with other forms of disability.¹⁶⁰ Moreover, even for the blind, this additional standard deduction may overstate the extra costs of living with a disability, duplicate the deduction for medical expenses, or "make[] it less likely that a blind person will be able to deduct medical expenses or any employment-related expenses."¹⁶¹ Although many of the additional costs of living with a disability are now deductible as medical expenses or employment-related expenses (exempted from the 2% floor for miscellaneous itemized deductions),¹⁶² no deduction is currently allowed for any additional costs incurred by disabled individuals in commuting to and from work.¹⁶³ In addition, the exemption of "impairment-related work expenses" from the application of the 2% floor for miscellaneous itemized deductions has been described as having only modest practical effects¹⁶⁴ because those

158. *Id.*; see also Jolls, *supra* note 155, at 278-80 (acknowledging the shortcomings of the studies upon which she relies). See generally Robert Silverstein et al., *What Policymakers Need and Must Demand from Research Regarding the Employment Rate of Persons with Disabilities*, 23 BEHAV. SCI. & L. 399 (2005) (describing the difficulties and challenges associated with researching the employment rate of individuals with disabilities).

159. I.R.C. § 63(f) (2000).

160. See Seto & Buhai, *supra* note 31, at 1123-24.

161. *Id.* at 1123; see also *id.* at 1124, 1141.

162. I.R.C. § 67(b)(6), (d) (2000).

163. See Seto & Buhai, *supra* note 31, at 1131, 1134-35.

164. See *id.* at 1129. I would note that this statement was made in reliance, in part, on the non-deductibility of impairment-related work expenses for

expenses are still treated as itemized deductions (i.e., they are only allowed in lieu of the standard deduction and not in addition to it, as are most other expenses incurred to produce income).¹⁶⁵ It might further be argued that the 7.5% floor on medical expenses, which is meant to screen out all but extraordinary medical expenses,¹⁶⁶ is inappropriately applied to the extra costs of daily living incurred by individuals with disabilities.¹⁶⁷ In these ways, the income of individuals with disabilities may either be overstated or understated, resulting in a mismeasurement of the effects of discrimination on income and undermining the viability of using income as a proxy for disability discrimination.

Income also may paint an incomplete picture of the societal discrimination faced by those who experience discrimination along multiple axes (e.g., women of color). Kimberle Crenshaw has analogized the experience of such multiple disadvantages to a traffic intersection:

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them.¹⁶⁸

Crenshaw has remarked that the experience of being multiply disadvantaged can be greater than the sum of the separate disadvantages; thus, for example, African

alternative minimum tax (AMT) purposes; however, this assertion appears to be incorrect. While miscellaneous itemized deductions are disallowed under the AMT, see I.R.C. § 56(b)(1)(A)(i) (2000), impairment-related work expenses are expressly carved out from the definition of miscellaneous itemized deductions, see *id.* § 67(b), and I have come across no other provision that disallows these expenses for AMT purposes.

165. See I.R.C. § 62 (2000) (listing "above-the-line" deductions that are allowed in addition to any standard deduction to which a taxpayer is entitled under § 63).

166. See Seto & Buhai, *supra* note 31, at 1104.

167. See *id.* at 1143 (referring to an argument made by David Duff in response to a draft of the article, but expressing their disagreement with this argument).

168. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149.

American women's experience of subordination cannot be summed up by merely adding together racism and sexism.¹⁶⁹ Crenshaw makes the point quite forcefully and eloquently in the following passage:

Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.¹⁷⁰

Whether income accurately reflects such unique, intersectional experiences of discrimination is not at all clear. For example, sociological studies of wage inequality that probe the impact of intersecting race and gender have produced mixed results.¹⁷¹ As a review of that literature notes: "Overall, studies of wage determination at the individual level echo . . . findings that there are some distinct patterns for women of color, but also similarities to coethnic men (the race stratification system) and to White women (the gender stratification system)."¹⁷² However, at

169. *Id.* at 140; see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (building on these observations "by exploring the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color"). This perspective is shared by others. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-72; Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 704-10, 714-28 (2001); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587-89 (1990); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 307-16 (2001); see also Browne & Misra, *supra* note 147, at 488 (indicating that others share this perspective); Mary Jo Wiggins, *Foreword: The Future of Intersectionality and Critical Race Feminism*, 11 J. CONTEMP. LEGAL ISSUES 677, 677-78 (2001) (same).

170. Crenshaw, *supra* note 168, at 149.

171. See Browne & Misra, *supra* note 147, at 496.

172. *Id.* at 497; see, e.g., Irene Browne & Rachel Askew, *Race, Ethnicity, and Wage Inequality Among Women: What Happened in the 1990s and Early 21st*

least one study cited in the review indicates that race and gender are "independent and additive."¹⁷³ The study "report[ed] that evidence for intersectionality appears negligible, concluding that race and gender represent two independent systems of inequality."¹⁷⁴ The authors of the

Century?, 48 AM. BEHAV. SCIENTIST 1275 (2005); Leslie McCall, *Sources of Racial Wage Inequality in Metropolitan Labor Markets: Racial, Ethnic, and Gender Differences*, 66 AM. SOC. REV. 520 (2001); Rosalie A. Torres Stone et al., *Beyond Asian American: Examining Conditions and Mechanisms of Earnings Inequality for Filipina and Asian Indian Women*, 49 SOC. PERSP. 261 (2006); Rosalie Torres Stone & Julia McQuillan, *Beyond Hispanic/Latino: The Importance of Gender/Ethnicity-Specific Earnings Analyses*, 36 SOC. SCI. RES. 175 (2007).

173. David A. Cotter et al., *Systems of Gender, Race, and Class Inequality: Multilevel Analyses*, 78 SOC. FORCES 433, 453 (1999); see also Browne & Misra, *supra* note 147, at 496, 498.

In their book on social dominance, Jim Sidanius and Felicia Pratto put forth the "subordinate-male target hypothesis" that arbitrary-set discrimination (i.e., a residual category that includes any discrimination other than on the basis of age or gender) will disproportionately impact males in the arbitrary-set group. JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* 49-50 (1999). This hypothesis, which they support with survey data from a number of different areas (e.g., housing discrimination, *id.* at 144-45, discrimination in the retail market, *id.* at 147, employment discrimination, *id.* at 157-62, and discrimination in education, *id.* at 189-91), is "in direct contradiction to the generally accepted double-jeopardy hypothesis" of the literature on intersectionality. *Id.* at 50. For instance, the subordinate-male target hypothesis would, all other things being equal, predict that African American males would suffer more as a result of discrimination than African American females, even though African American males experience subordination along only one axis (i.e., race) and African American females experience subordination along two axes (i.e., race and gender). See *id.* Based on their review of empirical data, Sidanius and Pratto maintain that, "[t]hough women from subordinate arbitrary-set groups clearly suffer from gender discrimination along with women from dominant arbitrary-set groups, the arbitrary-set discrimination against these subordinate women is either relatively mild or nonexistent." *Id.* at 295. To explain the subordinate-male target hypothesis, Sidanius and Pratto draw on evolutionary psychology and rely upon the idea that men and women engage in different reproductive strategies (i.e., women seek out high status mates while men attempt to monopolize social, political, and economic resources to increase their chances of reproductive success given women's status preference). See *id.* at 263-65, 295-96. Unsurprisingly, Sidanius and Pratto's work has provoked criticism. See, e.g., Browne & Misra, *supra* note 147, at 493-94; Michael T. Schmitt & Nyla R. Branscombe, *Will the Real Social Dominance Theory Please Stand Up?*, 42 BRIT. J. SOC. PSYCHOL. 215 (2003); John C. Turner & Katherine J. Reynolds, *Why Social Dominance Theory Has Been Falsified*, 42 BRIT. J. SOC. PSYCHOL. 199 (2003).

174. Browne & Misra, *supra* note 147, at 496; see also Cotter et al., *supra* note 173.

study suggest that their findings provide support for arguments “about the potential salience of one dimension of stratification over another.”¹⁷⁵ Interestingly, based on the results of their research, the authors of the study pointedly raised “the question of why racial and gender economic inequality are uncorrelated when racial and gender prejudice are so closely related.”¹⁷⁶

Faced with conflicting studies, the authors of the literature review concluded that, “although much evidence indicates that there is some amount of race/gender intersections in wage inequality, the existence and degree of intersections depends on how wages are measured, which groups are compared, and how the relationships are modeled.”¹⁷⁷ In order “[t]o arbitrate between these mixed findings,”¹⁷⁸ the authors of the literature review asserted that “better theories are needed that identify the conditions under which race and gender will intersect to produce wage inequities.”¹⁷⁹ Underscoring this point—and concomitantly highlighting the inappropriateness of relying upon income as a proxy for the general discrimination suffered by multiply disadvantaged persons—the authors of the literature review remarked on the distinct gap between the ability to articulate how intersectionality affects the social construction of gender and race and the ability to articulate how intersectionality affects wages:

The literature on wage inequality in particular shows the gaps in the literature. Theories of intersectionality are less developed in articulating how intersections of gender and race are implicated in the intricate workings of the economy at the macro level than they are about the social construction of gender and race.¹⁸⁰

175. Cotter et al., *supra* note 173, at 446. This appears to be a reference to the elision of gender in efforts to address racial subordination and the elision of race in efforts to address women’s subordination. See Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988) (cited by Cotter et al., *supra*, as an example of such an argument about salience).

176. Cotter et al., *supra* note 173, at 454.

177. Browne & Misra, *supra* note 147, at 498.

178. *Id.*

179. *Id.*

180. *Id.* at 495. The economics literature appears to be even less advanced in terms of addressing the intersection of multiple lines of disadvantage:

These doubts about the propriety of using income as a proxy for intersectional discrimination are confirmed with respect to a different point of intersection; that is, the intersection of gender and sexual orientation. Though gay men earn less than heterosexual men, studies have shown that lesbians and bisexual women earn *more* than heterosexual women (i.e., they experience what has been termed a “wage premium”).¹⁸¹ This result is counterintuitive because one would expect lesbians and bisexual women to do worse in the labor market than heterosexual women—not better—due to the additional disadvantage of their sexual orientation. Yet, it may be that any negative effects on wages caused by lesbians’ and bisexual women’s gender and sexual orientation are more than counterbalanced by positive effects due to their (actual or imagined) departure from stereotypical gender roles—particularly with regard to marriage and child-rearing, which are often perceived to reduce a woman’s commitment to market labor.¹⁸² In other words, several negatives (i.e., gender and sexual orientation discrimination plus what looks like a bonus for departing from gender stereotypes but that is, in reality, just more gender discrimination) seem to come together to produce a positive (i.e., a wage premium). This positive outcome, in the form of a wage premium, sends the (erroneous) message that lesbians and bisexual women are treated better by society than heterosexual women. Accordingly, income

With a few recent exceptions, economists who study the status of women of color in the United States have not addressed the intersectionality of gender, race, and class. Studies of the determinants of earnings tend to focus either on racial differences or on gender differences, but rarely on both. To study the effects of race, a researcher compares the wages of black men to those of white men and the wages of black women to those of white women. To study the effects of gender, a researcher compares the wages of black women to those of black men and the wages of white women to those of white men. The combined effects of race and gender are rarely contemplated in the same paper.

Rose M. Brewer et al., *The Complexities and Potential of Theorizing Gender, Caste, Race, and Class*, 8 FEMINIST ECON. 3, 7 (2002).

181. *E.g.*, Black et al., *supra* note 150, at 466; Blandford, *supra* note 150, at 638-39; *see also* Letitia Anne Peplau & Adam Fingerhut, *The Paradox of the Lesbian Worker*, 60 J. SOC. ISSUES 719, 720-21 (2004) (mentioning a number of studies).

182. *See* Black et al., *supra* note 150, at 466-69; Blandford, *supra* note 150, at 639-40; Peplau & Fingerhut, *supra* note 181, at 721-27.

paints a misleading picture of the discrimination faced by lesbians and bisexual women.

Moreover, income generally fails to capture the psychological dimension of discrimination. Psychologists have recently begun to turn their attention to studying the mental health effects of discrimination. A recent review of 138 separate studies concerning either the psychological or physical health effects of self-reported experiences of racism found that "[t]he most consistent association between self-reported racism and health was found for negative mental health outcomes, for which 72% of examined outcomes were significantly associated with self-reported racism, all in the expected direction (i.e. more self-reported racism associated with worse mental health outcomes)."¹⁸³ Among the negative mental health effects reported by these studies were emotional distress, depression, obsessive-compulsive symptoms, anxiety, stress, and somatization (i.e., the conversion of anxiety into physical symptoms).¹⁸⁴ Similarly, researchers have detected such "minority" stress and its concomitant negative mental health effects among lesbians, gay men, and bisexuals.¹⁸⁵ Ilan Meyer of Columbia University's Mailman School of Public Health has even "proposed a minority stress model that explains the higher prevalence of mental disorders [among lesbians, gay men,

183. Yin Paradies, *A Systematic Review of Empirical Research on Self-Reported Racism and Health*, 35 INT'L J. EPIDEMIOLOGY 888, 892 (2006); see also *id.* at 895 ("The most consistent findings in this body of research to date have been for negative mental health outcomes and health-related behaviours and evidence from longitudinal studies also suggests that self-reported racism precedes ill health rather than vice versa.").

184. *Id.* at 892 tbl.2.

185. See, e.g., Robin J. Lewis et al., *Stressors for Gay Men and Lesbians: Life Stress, Gay-Related Stress, Stigma Consciousness, and Depressive Symptoms*, 22 J. SOC. & CLINICAL PSYCHOL. 716, 717-18, 725-26 (2003); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 45-52 (1995); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 679-82 (2003) [hereinafter Meyer, *Prejudice*]; Ilan H. Meyer & Laura Dean, *Internalized Homophobia, Intimacy, and Sexual Behavior Among Gay and Bisexual Men*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 160, 178-83 (Gregory M. Herek ed., 1998). See generally Joanne DiPlacido, *Minority Stress Among Lesbians, Gay Men, and Bisexuals: A Consequence of Heterosexism, Homophobia, and Stigmatization*, in STIGMA AND SEXUAL ORIENTATION, *supra*, at 185.

and bisexuals] as caused by excess in social stressors related to stigma and prejudice.”¹⁸⁶ Yet, as a natural corollary of its inability to account for “psychic” income, the income tax does not allow for any sort of a “psychic” deduction to account for the negative mental health effects of discrimination.¹⁸⁷ As might by now be expected, these effects enter into the calculation of income *only* if they have economic consequences (that is, if they result in out-of-pocket expenses for medical care).¹⁸⁸

Compounding its failure to account for the negative health effects of discrimination, the income tax can, in fact, exacerbate those effects. As I have explained in detail in an earlier article,¹⁸⁹ the application of the income tax (and the gift tax) to same-sex couples is woefully uncertain in important areas. When coupled with the steep civil and criminal penalties that can be imposed on same-sex couples for failing to comply with the tax laws, this uncertainty “hang[s] as an ominous Sword of Damocles over the heads of lesbians and gay men throughout the country.”¹⁹⁰ The hovering possibility of punishment under the tax laws for being in a same-sex relationship—along with the (explicit and implicit) stigmatizing effects of the application of the Defense of Marriage Act¹⁹¹ through the Code—surely adds to the “excess stress to which [lesbians, gay men, and bisexuals] are exposed as a result of their . . . minority[]

186. Meyer, *Prejudice*, *supra* note 185, at 691.

187. See Daniel Shaviro, *The Man Who Lost too Much: Zarin v. Commissioner and the Measurement of Taxable Consumption*, 45 TAX L. REV. 215, 224 (1990) (“[T]axable consumption commonly is viewed as limited to satisfactions from the use of economic resources . . . not, say, to seeing a beautiful sunset or making a new friend. The chief reason for this limitation is administrative: Nonmaterial psychic income may be impossible to measure.” (footnotes omitted)).

188. See I.R.C. § 104(a) (2000) (flush language) (the § 104(a)(2) exclusion for damages received on account of “physical” injury or sickness does not apply to emotional distress except to the extent of amounts paid for medical care); *id.* § 213 (allowing a deduction for extraordinary medical expenses).

189. Infanti, *supra* note 113, at 783-88.

190. *Id.* at 801 (quoting Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against “Sodomy” Laws*, 21 FORDHAM URB. L.J. 997, 997 (1994)).

191. 1 U.S.C. § 7 (2000) (defining “marriage,” for purposes of all federal laws—including the Code—as “a legal union between one man and one woman as husband and wife”).

position.”¹⁹²

For all of these reasons, ignoring race, ethnicity, gender, sexual orientation, disability, and/or other characteristics in tax policy analysis cannot be justified on the ground that “income” serves as a proxy for invidious discrimination based on those characteristics.¹⁹³

C. *The Perfect Is the Enemy of the Good*

As income appears to be an indisputably imperfect proxy for discrimination, the next most natural argument in favor of the status quo is a resort to the old saw that “the perfect is the enemy of the good.” This is essentially a restatement of Galvin’s contribution to the *North Carolina Law Review* symposium on critical tax theory in which he asserted that it is just too difficult to take race or gender (not to mention other bases for invidious discrimination) into consideration when formulating tax policy.¹⁹⁴ Instead, Galvin argued, we should focus our efforts on attaining the “neutral” goal of implementing a comprehensive income (or alternatively, a pure consumed income) tax base, because “[l]ower-income, middle-income, or higher-income African-Americans, Hispanics, Asians, Native Americans, or other groups all struggle with the human predicament. To try to solve particular problems through the Internal Revenue Code would present a daunting challenge no lawmaker should or could take on.”¹⁹⁵ Frankly, I find this argument particularly unconvincing.

Commentators often speak of the need to simplify the

192. Meyer, *Prejudice*, *supra* note 185, at 675; *see also* Infanti, *supra* note 113, at 800-03 (explaining how the Code operates in much the same way as a sodomy statute).

193. It is worth noting that income is not just a poor proxy for discrimination. Those who believe that “[r]edistribution in favor of those with bad brute luck is attractive on both utilitarian and liberal egalitarian grounds” have similarly found income to come up short in its ability to serve as a proxy—in that case, for endowment. Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145, 1181 (2006). *See generally id.* (surveying the endowment tax literature). And, tying into the next section in the text, Zelenak even critiques the idea that the income tax, by itself, is simply the best that can be done in approaching an endowment tax base. *See id.* My thanks go to Adam Rosenzweig for pointing me in the direction of this literature.

194. *See supra* note 114 and accompanying text.

195. *See supra* note 114, at 1752.

tax system; however, when faced with a choice between simple rules, on the one hand, and efficient or equitable rules, on the other, the efficient or equitable rules usually win out.¹⁹⁶ As Michael Graetz has remarked, "simplicity always seems to be the forgotten stepchild of income tax policy. Routinely lip service is offered to the idea that the tax law ought to be as simple to comply with and administer as possible; then, after a nod and a wink, vaulting complexity overleaps itself."¹⁹⁷ It seems suspicious that this "forgotten stepchild" is suddenly remembered and trotted out as soon as the conversation turns to questions of race, ethnicity, gender, sexual orientation, disability, and/or other characteristics that form the basis for invidious discrimination. Why is additional complexity not an acceptable price to pay for enhancing the fairness of the income tax along these lines?

It also seems disingenuous to argue that taking these concerns into account is just too difficult, when we tolerate mind-numbing levels of complexity in areas that benefit the wealthy. In this regard, the preferential tax rates applicable to capital gains immediately spring to mind.¹⁹⁸ Were we to tax capital gains at the same rates as ordinary income, we would no longer need, among other Code provisions and sundry rules: (1) our ambiguous definition of "capital asset"¹⁹⁹ and the reams of case law interpreting

196. Simplicity, on the other hand, is not inherently good. . . .[S]imple tax laws may be good or bad, depending upon their effect on equity on [sic] efficiency. To the extent simple tax laws enhance equality and efficiency they are good. They are not good strictly because they are simple—they are good because they promote the other, more important objectives. No one would argue that equity is good because it is simple; nor would anyone contend that efficiency is good because it promotes simplicity. Simplicity, therefore, is a means and not an end. If simplicity were more often than not a helpful means to the ends of equity and efficiency, one could at least argue that simplicity was generally a good thing. Again, however, the propensity for simplicity to do just as much damage to these core values, as much as it might help them, cuts against this argument.

Donaldson, *supra* note 26, at 740.

197. Graetz, *supra* note 116, at 310.

198. See 2 BITTKER & LOKKEN, *supra* note 24, ¶ 46.1, at 46-6 ("The capital gain and loss provisions are a leading source of complexity in the tax law . . .").

199. I.R.C. § 1221 (2000).

it;²⁰⁰ (2) the case law interpreting the distinction between a “sale or other disposition” (which triggers realization of gain or loss under § 1001) and a “sale or exchange” (the narrower category of dispositions that qualify for capital gain or loss treatment) and the attendant legislative fixes;²⁰¹ (3) the § 1231 hotchpot;²⁰² (4) depreciation recapture;²⁰³ (5) § 1(h), which contains slightly fewer different tax rates (i.e., 5%, 15%, 25%, and 28%) than the ordinary income rate schedule (i.e., 10%, 15%, 25%, 28%, 33%, and 35%), but that is far harder to apply in practice;²⁰⁴ (6) the capital loss limitations;²⁰⁵ and (7) the capital loss carryover rules.²⁰⁶ The tax “preference” that gives rise to all of this complexity is afforded on grounds that can best be described as contestable;²⁰⁷ yet, the benefits are reaped overwhelmingly by the wealthy.²⁰⁸

200. See 2 BITTKER & LOKKEN, *supra* note 24, ¶¶ 47.1-.9.

201. See *id.* ¶¶ 48.1-4.

202. See I.R.C. § 1231 (2000).

203. See *id.* §§ 1245, 1250.

204. *Id.* § 1(h); Rev. Proc. 2006-53, § 3.01, 2006-48 I.R.B. 996; see also INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, 2006 1040 INSTRUCTIONS, at D-1 to D-10 (2006) (providing instructions on reporting and calculating the tax on capital gains); INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, SCHEDULE D (FORM 1040) (2006) (form for reporting and calculating the tax on capital gains).

205. See I.R.C. § 1211 (2000).

206. See *id.* § 1212.

207. See ANDREWS, *supra* note 3, at 1043-46; Donaldson, *supra* note 26, at 714 n.325. Compare STAFF OF JOINT COMM. ON TAX'N, *supra* note 145, at 34 tbl.1 (classifying the preferential capital gain rates as a tax expenditure), with OFFICE OF MGMT. & BUDGET, *supra* note 146, at 299, 305 (indicating that the preferential rate for capital gains recognized on the sale or exchange of corporate stock has not been treated as a tax expenditure under the “reference law baseline” since 2005), *id.* at 317 (indicating that the preferential rate for capital gains is not reported as a tax expenditure when a consumption tax is used as the baseline), and *id.* at 321 (reporting capital gains recognized on the sale or exchange of corporate stock as a “negative” tax expenditure—i.e., as an overpayment of tax to the federal government).

208. A major complaint made by some about lower gains rates cut is that they primarily benefit very high income individuals. Capital gains are concentrated among higher income individuals because these individuals tend to own capital and because they are likely to own capital that generates capital gains. For example, the Joint Committee on Taxation indicated that for 2005, 88% of the benefit of lower rates [sic] to individuals with incomes over \$200,000 and 95% would go to

Moreover, the paeon to simplification seems premature. As I have explained elsewhere, the critical tax movement is still in its early stages.²⁰⁹ How can one possibly conclude that the benefits of critical analysis are dwarfed by the complexity they would introduce into the Code when critical tax theorists have produced only a relative handful of contributions to the tax policy literature? To condemn an entire area of inquiry based on initial forays seems hasty (if not hostile and reactionary). The more prudent course is to wait for critical tax theorists to produce policy analyses and to judge them on their individual merits as they appear—rather than before they are ever written.

III. THE HEGEMONIC QUALITY OF TAX EQUITY

Thus far, we have explored tax equity from a critical perspective. We first considered the subtle ways in which tax equity, subsumed by the overarching goal of efficiency, shapes the tax policy debate. We witnessed how the concept of tax equity, as currently constructed, is based on the assumption of an artificially homogeneous population; how it effectively screens some critical contributions out of the tax policy debate; and how it sanitizes any remaining critical contributions to that debate by forcing them to be framed in “neutral” terms. We then considered arguments in favor of retaining the tax equity status quo, and discussed the reasons why those arguments come up short. In this Part, I would like to shift from a critical to a dominant group perspective and explore why, from that perspective, constructing a concept of tax equity that so narrowly focuses on the economic dimension of people is such a powerful rhetorical move.

individuals with incomes over \$100,000. Individuals with \$200,000 of income account for about 3% of taxpayers and individuals with incomes over \$100,000 account for less [sic] about 14%.

JANE G. GRAVELLE, CONG. RESEARCH SERV., LIBRARY OF CONG., REP. NO. 96-769, CAPITAL GAINS TAXES: AN OVERVIEW, at CRS-6 (2007), *available at* <http://www.opencrs.com/getfile.php?rid=56609>; *see also* CITIZENS FOR TAX JUSTICE, WHO PAYS CAPITAL GAINS TAXES? 1 (2006), <http://www.ctj.org/pdf/cg0306.pdf> (indicating that, in 2005, “[t]he wealthiest 10 percent of taxpayers enjoyed 90 percent of the capital gains eligible” for preferential rates, while “[t]he poorest sixty percent of Americans, by contrast, collectively received just 2 percent of the capital gains eligible for the lower capital gains rates”).

209. Infanti, *supra* note 17, at 712-13.

A. *The Gramscian Concept of Hegemony*

To help us understand the power of this rhetorical move, I would like to begin by briefly introducing the concept of “hegemony” as developed by Antonio Gramsci. Gramsci was an Italian communist who was imprisoned by Mussolini from 1926–1937 and died within days of his release.²¹⁰ During his decade-long imprisonment, Gramsci “produced the hugely influential series of essays posthumously assembled as the *Prison Notebooks*,”²¹¹ in which he explicated his conceptualization of hegemony.²¹² The importance of this concept to the instant project is evinced by Douglas Litowitz’s observation that “Gramsci’s work on hegemony provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual.”²¹³

Gramsci posited that a social group maintains its supremacy through a combination of force and consent.²¹⁴ In Gramsci’s own words:

210. See Quintin Hoare & Geoffrey Nowell Smith, *General Introduction to SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI*, at xvii, xvii–xviii, xciii–xciv (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) [hereinafter PRISON NOTEBOOKS].

211. Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 518; see also *id.* at 515 (describing Gramsci’s concept of “hegemony” as a “central theme during the heyday of the Critical Legal Studies movement”); CARL BOGGS, *GRAMSCI’S MARXISM* 7 (1976) (describing the rising influence of Gramsci’s thought in Western Europe and the United States during the 1960s and 1970s); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 32 (1982) (stating that Gramsci’s concept of hegemony made “him a crucial figure in 20th century Marxist theory”).

212. Recourse to this concept is particularly appropriate in the context of the current project because, through his development of the concept of hegemony, Gramsci is credited with abandoning economic determinism (i.e., the view that the superstructure—that is, law, politics, and ideology—is merely a reflection of the base—that is, the economic structure of society) in favor of a more complex and dynamic view of the interaction between base and superstructure. See BOGGS, *supra* note 211, at 36–38; IVES, *supra* note 2, at 3; Litowitz, *supra* note 211, at 527–29; see also PRISON NOTEBOOKS, *supra* note 210, at 366, 377, 407–09.

213. Litowitz, *supra* note 211, at 519.

214. PRISON NOTEBOOKS, *supra* note 210, at 12; see also Edward Greer, *Antonio Gramsci and “Legal Hegemony,”* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304, 305 (David Kairys ed., 1982); Litowitz, *supra* note 211, at 518.

[T]he supremacy of a social group manifests itself in two ways, as "domination" and as "intellectual and moral leadership". A social group dominates antagonistic groups, which it tends to "liquidate", or to subjugate perhaps even by armed force; it leads kindred and allied groups. A social group can, and indeed must, already exercise "leadership" before winning governmental power (this indeed is one of the principal conditions for the winning of such power); it subsequently becomes dominant when it exercises power, but even if it holds it firmly in its grasp, it must continue to "lead" as well.²¹⁵

Here, "domination" is associated with "[t]he apparatus of state coercive power which 'legally' enforces discipline on those groups who do not 'consent' either actively or passively."²¹⁶ Examples of such legal force include "coercive state action by the courts, the police, the army, and the national guard."²¹⁷ Naturally, "domination" also entails the threat of future force in the event that those who currently consent to their own subordination later change their minds.²¹⁸

But domination alone is insufficient to maintain lasting control over subordinated groups.²¹⁹ The dominant group must also exercise "leadership," what Gramsci often labeled "hegemony."²²⁰ The "leadership" (or "hegemony") that Gramsci speaks of is a leadership of ideas. Gramsci observed that, through a dominant group's exercise of ideological leadership, it could actually secure the consent of other groups to their own subordination. Thus, Gramsci described "hegemony" as

[t]he "spontaneous" consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is "historically" caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of

215. PRISON NOTEBOOKS, *supra* note 210, at 57-58.

216. *Id.* at 12.

217. Litowitz, *supra* note 211, at 519.

218. See PRISON NOTEBOOKS, *supra* note 210, at 12.

219. See *id.* at 59, 310; Litowitz, *supra* note 211, at 518-19.

220. See Quintin Hoare & Geoffrey Nowell Smith, *Preface* to PRISON NOTEBOOKS, *supra* note 210, at ix, xiii-xiv.

production.²²¹

As this passage suggests, this consent is not “spontaneous” in the usual sense of the word. Despite feeling uncoerced, subordinated groups’ consent is actually shaped and influenced by past history, including past exercises of “leadership,” which those groups have internalized to the point where it has simply come to feel normal and natural.²²² The dominant group secures this “spontaneous” consent by offering a conception of life or world-view that serves its own interests, but that, at the same time, is connected with “common sense” (i.e., that taps into this internalized past history) in a way that makes it appealing to both intellectuals and the masses.²²³ “Common sense” here takes on a special meaning that provides a useful link to this idea that “‘pure’ spontaneity does not exist in history”;²²⁴ for Gramsci, “common sense” (as distinguished from “good sense”) means “the uncritical and largely unconscious way of perceiving and understanding the world that has become ‘common’ in any given epoch.”²²⁵

Of course, the dominant group must make some sacrifices to subordinated groups in fashioning this world-view in order to align their interests and make the subordinated groups’ consent feasible; however, those sacrifices occur only at the margins and never jeopardize the dominant group’s control.²²⁶ With some effort, the dominant group’s world-view (as tempered to appeal to subordinated groups) can eventually transform the “popular ‘mentality’” and come to be “concretely—i.e. historically and socially—universal.”²²⁷ Once a world-view achieves such mass acceptance, it comes to seem natural or normal, and it becomes “implicitly manifest in art, in law, in economic activity and in all manifestations of individual and

221. PRISON NOTEBOOKS, *supra* note 210, at 12.

222. See *id.* at 196-200; IVES, *supra* note 2, at 96-98; see also *infra* note 228 and accompanying text.

223. See PRISON NOTEBOOKS, *supra* note 210, at 328-29, 341, 421-22.

224. *Id.* at 196.

225. *Id.* at 322.

226. See *id.* at 161; see also Greer, *supra* note 214, at 305-06.

227. PRISON NOTEBOOKS, *supra* note 210, at 348.

collective life."²²⁸

[This] type of control . . . is more insidious and complicated to achieve. It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group's perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense. In a hegemonic regime, an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture.²²⁹

As this passage implies, the actual work of obtaining the consent of subordinated groups is performed by the "intellectuals," a group that Gramsci broadly construed to encompass all those who "are the dominant group's 'deputies' exercising the subaltern functions of social hegemony and political government."²³⁰ Gramsci did stress, however, the importance to any social group seeking domination of ideologically conquering and assimilating the "traditional intellectuals" (e.g., "the man of letters, the philosopher, the artist"²³¹), because they play an important role in packaging and diffusing the dominant group's ideas.²³²

Importantly, Gramsci viewed the exercise of hegemony as a dynamic process rather than a static condition: "The reality of any hegemony, in the extended political and cultural sense, is that, while by definition, it is always dominant, it is never either total or exclusive."²³³ Consequently, we should expect "forms of alternative or directly oppositional politics and culture [to] exist as

228. *Id.* at 328; *see also id.* at 103-04, 325, 327.

229. Litowitz, *supra* note 211, at 519.

230. PRISON NOTEBOOKS, *supra* note 210, at 12; *see id.* ("This way of posing the problem has as a result a considerable extension of the concept of intellectual, but it is the only way which enables one to reach a concrete approximation of reality.").

231. *Id.* at 9.

232. *See id.* at 10, 338-39, 341, 390, 395-96, 419-20; IVES, *supra* note 2, at 72-77.

233. RAYMOND WILLIAMS, MARXISM AND LITERATURE 113 (1977); *see also* BOGGS, *supra* note 211, at 40.

significant elements in the society,”²³⁴ with some of these alternative or oppositional ideas having been shaped against the backdrop of the specific hegemony and others having grown up independent of it.²³⁵ In other words, it is both possible and necessary to chip away at and undermine the ideological hegemony of the dominant group and to offer what some commentators have labeled a “counter-hegemony” (i.e., leadership in an alternative direction) before the dominant group’s hold can be broken and its control replaced with that of another group.²³⁶ Nevertheless, we should concomitantly expect the hegemonic process to attempt to exercise control over these alternative or oppositional ideas, whether by neutralizing, reducing, or incorporating them into itself.²³⁷

Because the concept of hegemony was not the exclusive subject of a single essay in the *Prison Notebooks*, but was treated in scattered snippets of essays devoted to other topics and can often be difficult to understand and piece together, commentators have offered a number of useful recapitulations of the concept.²³⁸ To help clarify the concept, I offer the following summary from Carl Boggs, which is often quoted in discussions of Gramsci’s conceptualization of hegemony:

By hegemony Gramsci meant the permeation throughout civil society—including a whole range of structures and activities like trade unions, schools, the churches, and the family—of an entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order and the class interests that dominate it. Hegemony in this sense might be defined as an ‘organizing principle’, or world-view (or combination of such world-views), that is diffused by agencies of ideological control and socialization into every area of daily life. To the extent that this prevailing consciousness is internalized by the broad

234. WILLIAMS, *supra* note 233, at 113-14.

235. *Id.* at 113-14; *see also* PRISON NOTEBOOKS, *supra* note 210, at 333, 365-66.

236. *See* BOGGS, *supra* note 211, at 40-42; PRISON NOTEBOOKS, *supra* note 210, at 59, 60-61, 388; *see also* IVES, *supra* note 2, at 68 (indicating that Gramsci never used the term “counter-hegemony” and noting “confusion about the extent to which Gramsci advocates hegemony”).

237. WILLIAMS, *supra* note 233, at 113-14.

238. *See* IVES, *supra* note 2, at 64-67; Kennedy, *supra* note 211, at 33; Litowitz, *supra* note 211, at 523.

masses, it becomes part of 'common sense'; as all ruling elites seek to perpetuate their power, wealth, and status, they necessarily attempt to popularize their own philosophy, culture, morality, etc. and render them unchallengeable, part of the natural order of things. For hegemony to assert itself successfully in any society, therefore, it must operate in a dualistic manner: as a 'general conception of life' for the masses, and as a 'scholastic programme' or set of principles which is advanced by a sector of the intellectuals.

. . . Where hegemony appeared as strong force, it fulfilled a role that guns and tanks could never perform. It mystified power relations, public issues, and events; it encouraged a sense of fatalism and passivity towards political action; and it justified every type of system-serving sacrifice and deprivation. In short, hegemony worked in many ways to induce the oppressed to accept or 'consent' to their own exploitation and daily misery.²³⁹

Before leaving our brief introduction to the Gramscian concept of hegemony, I would like to spend a few lines describing the role that law plays in hegemonic activity. Although Gramsci devoted scant attention to the law in his *Prison Notebooks*,²⁴⁰ he did contemplate that it would play an important role in advancing the ideological hegemony of the dominant group.²⁴¹ Gramsci conceptualized the law's role as follows:

If every State tends to create and maintain a certain type of civilisation and of citizen (and hence of collective life and of individual relations), and to eliminate certain customs and attitudes and to disseminate others, then the Law will be its instrument for this purpose (together with the school system, and other institutions and activities). It must be developed so that it is suitable for such a purpose—so that it is maximally effective and productive of positive results.²⁴²

We can see in this passage that Gramsci envisioned the law as playing a dual role that corresponds to the notions of

239. BOGGS, *supra* note 211, at 39-40. For other recapitulations, see WILLIAMS, *supra* note 233, at 108; Kennedy, *supra* note 211, at 32; and Litowitz, *supra* note 211, at 519.

240. Kennedy, *supra* note 211, at 35; Litowitz, *supra* note 211, at 530.

241. See Greer, *supra* note 214, at 308.

242. PRISON NOTEBOOKS, *supra* note 210, at 246.

“domination” and “hegemony.”²⁴³ Obviously, the law furthers “domination” through its repressive function of punishing those who fail to conform to the norms promulgated by the dominant group.²⁴⁴ At the same time, however, the law furthers the ideological hegemony of the dominant group by serving an assimilationist/educational function:

This problem contains in a nutshell the entire “juridical problem”, i.e. the problem of assimilating the entire grouping to its most advanced fraction; it is a problem of education of the masses, of their “adaptation” in accordance with the requirements of the goal to be achieved. This is precisely the function of law in the State and in society; through “law” the State renders the ruling group “homogeneous”, and tends to create a social conformism which is useful to the ruling group’s line of development.²⁴⁵

In this regard, Gramsci saw the influence of the law as extending beyond the area of positive law and into general notions of morality and customs, allowing the “leadership” of the dominant group to be brought to bear even in areas where people feel that their actions are spontaneous and free.²⁴⁶

B. *Viewing Tax Equity Through the Lens of Gramscian Hegemony*

The concept of tax equity is part of the “entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order.”²⁴⁷ Cloaked in a mantle of positive connotations, tax equity is viewed as an indisputable good: “Equity is good. No one argues that an equitable state is morally or functionally flawed.”²⁴⁸ Even when not stated quite so forthrightly, we often see equity described as one of the hallmarks of a “good” tax system or of “good” tax policy.²⁴⁹ Equity has thus become part of our

243. See Litowitz, *supra* note 211, at 530.

244. See PRISON NOTEBOOKS, *supra* note 210, at 247.

245. *Id.* at 195; see also *id.* at 247, 258.

246. See *id.* at 195-96; Litowitz, *supra* note 211, at 530.

247. BOGGS, *supra* note 211, at 39.

248. Donaldson, *supra* note 26, at 739-40 (footnotes omitted).

249. *E.g.*, Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax*

tax “common sense”; it seems nearly “unchallengeable, [a] part of the natural order of things.”²⁵⁰ In fact, the concept is so fundamental to our “world-view” of tax that many of our basic tax textbooks begin by introducing (indoctrinating?) law students to the desirability of striving for an “equitable” tax system.²⁵¹

To achieve this ideological hegemony, the dominant group (i.e., economically privileged, able-bodied, straight, white males)²⁵² has had to make sacrifices; however, as

Legislation: A Series of Unfortunate Events, 56 DUKE L.J. 51, 55 (2006) (stating “the standard criteria for good tax policy: horizontal equity, vertical equity, and economic efficiency”); Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 747 (1995) (“While the hallmarks of a good tax system have included as many as seven different criteria, the many criteria are often reduced to the three broad categories of equity, efficiency, and simplicity.” (footnotes omitted)); John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 511 (1998) (“In future work, I hope to put forward concrete proposals for favorable tax treatment of married couples with children that meet the internal design criteria of a good tax system (horizontal and vertical equity, administrability, etc.) and yet accommodate other social goals.”); Eric J. Gouvin, *Radical Tax Reform, Municipal Finance, and the Conservative Agenda*, 56 RUTGERS L. REV. 409, 414 n.24 (2004) (“Although the exact formulation of the attributes of a good tax system vary, commentators almost always include ‘equity,’ ‘efficiency,’ and ‘simplicity,’ together with some other attribute or two, which often serves as a catch-all for other desirable aspects of a tax system.”); Kahn, *supra* note 7, at 649 (“The principles of horizontal and vertical equity and parallelism are among the myriad goals of a good tax system”); Jeffrey A. Maine, *Linking Limited Liability and Entity Taxation: A Critique of the ALI Reporters’ Study on the Taxation of Private Business Enterprises*, 62 U. PITT. L. REV. 223, 268 (2000) (“aiming for equity and economic efficiency, important criteria for good tax policy”); Katherine Pratt, *The Debt-Equity Distinction in a Second-Best World*, 53 VAND. L. REV. 1055, 1098 (2000) (“The goals of a good tax system include efficiency and equity.”); Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 92 (1990) (“[E]quity is not the only criterion of good tax policy.”).

250. BOGGS, *supra* note 211, at 39.

251. *See supra* note 3.

252. Not coincidentally, the tax law professoriate is overwhelmingly (i.e., 80%) male (and slightly more overwhelmingly male than the law professoriate on the whole), overwhelmingly (i.e., 91.16%) white (and, again, slightly more overwhelmingly white than the law professoriate on the whole), Eric A. Lustig, *Who We Are: An Empirical Study of the Tax Law Professoriate*, 1 PITT. TAX REV. 85, 95-97 (2003), and overwhelmingly (i.e., 98.25%) straight, Infanti, *supra* note 113, at 768 n.19. To the extent that these overwhelmingly straight, white, and male tax law professors also proceed from economically privileged backgrounds, they may be counted among the “organic intellectuals” of the dominant group, facilitating that group’s ideological hegemony over other social groups. *See* PRISON NOTEBOOKS, *supra* note 210, at 10, 12, 14 (referring to the intellectuals who proceed from, and are connected with, a social group as that group’s

expected, those sacrifices have occurred only at the margins. In particular, our tax system has consistently—albeit controversially—embraced the idea that the income tax burden ought to be progressive in nature, meaning that the amount of tax paid should increase as a taxpayer's income increases.²⁵³ The visible face of progressivity in our income tax system is the graduated rate structure, which, with nominal rates proceeding in five steps from 10% to 35%, appears to exact an increasing proportion of an individual's income as that income rises.²⁵⁴ But, again, appearances may be deceiving. As commentators have noted, "there are a number of reasons why nominal rate structures may not reflect the actual distribution of the tax burden," not the least of which is tinkering by Congress with the tax base "to exclude many items included in most

"organic intellectuals"); see also EDWARD W. SAID, *ORIENTALISM* 11 (Vintage Books 1979) ("For if it is true that no production of knowledge in the human sciences can ever ignore or disclaim its author's involvement as a human subject in his own circumstances, then it must also be true that for a European or American studying the Orient there can be no disclaiming the main circumstances of *his* actuality: that he comes up against the Orient as a European or American first, as an individual second. And to be a European or an American in such a situation is by no means an inert fact."); cf. Jose Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN'S L.J. 1, 32-36 (2006) (exploring the role of lesbian and gay "organic intellectuals" in countering heteronormativity). Even if they do not proceed from economically privileged backgrounds, these tax law professors have been elevated to an economically privileged status by entering the legal profession and the law professoriate—a status that sets them above and apart from their organic social group and renders them "traditional" intellectuals who are open to assimilation. See PRISON NOTEBOOKS, *supra* note 210, at 14-15. For an interesting discussion of how these different axes of (dis)advantage form an interlocking and mutually reinforcing system of subordination and how political conservatives have exploited a "discourse of distinctness" (i.e., disregarding the overlap of the different axes of discrimination) to stymie intergroup coalitions aimed at progressive reform, see Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002).

253. See *supra* notes 5-6; see also Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1906 (1987) ("A progressive rate structure has been part of the federal income tax system since its inception in 1913. Notwithstanding its lineage, the progressive rate structure has always been controversial, and the degree of progressivity has been subject to constant, and occasionally radical, change." (footnote omitted)).

254. See Rev. Proc. 2006-53, § 3.01, 2006-48 I.R.B. 996.

economic definitions of income.”²⁵⁵ Although it can be difficult to determine whether the tax burden is progressive in practice and not just in appearance, it has been said that “[m]ost analysts . . . believe the effective federal income tax rate structure is progressive, although not as progressive as the nominal rate structure.”²⁵⁶ Furthermore, as had been observed just a few years before this statement was made, when other sources of federal revenue are also taken into account, a noticeable shift occurred between 1969 and 1983 away from more progressive forms of taxation (e.g., the income tax and the estate and gift taxes) and toward more regressive forms of taxation (e.g., payroll taxes).²⁵⁷ Indeed, a recent study that covered individual and corporate income taxes, estate and gift taxes, and payroll taxes documented a striking decline in the overall progressivity of the federal tax system at the highest income levels between 1960 and 2004.²⁵⁸

In return for what has turned out to be a small (and decreasing) economic sacrifice, the dominant group has obtained control over the flow of ideas in tax policy debates. With this control, they are able, with the help of intellectuals, to channel the tax policy discourse in a direction that helps to obtain the consent of other groups to their own subordination. To this end, the dominant group has taken a concept (i.e., equity) that, at least in the

255. Bankman & Griffith, *supra* note 253, at 1909.

256. *Id.* at 1910.

257. See Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 270 (1983).

258. Thomas Piketty & Emmanuel Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. ECON. PERSP. 3, 22 (2007). Interestingly, the authors note that:

[T]he most dramatic changes in federal tax system progressivity almost always take place within the top 1 percent of income earners, with relatively small changes occurring below the top percentile. For example, many of the recent tax provisions that are currently hotly debated in Congress, such as whether there should be a permanent reduction in tax rates for capital gains and dividends, or whether the estate tax should be repealed, affect primarily the top percentile of the distribution—or even just an upper slice of the top percentile. This pattern strongly suggests that, in contrast to the standard political economy model, the progressivity of the current tax system is not being shaped by the self-interest of the median voter.

Id. at 23.

abstract, cannot help but evoke positive feelings and has made it even more appealing to academics by nearly eliminating its one potentially objectionable aspect: its inherent subjectivity. As we have seen, the entire idea of what counts as an "equitable" tax system has been constructed on and around "neutral" and "objective" economic factors. Though cynics might be wary that equity is open to manipulation because it is an "empty idea,"²⁵⁹ the tax version of equity seems to have allayed these concerns for most through its reliance on purely "neutral" and "objective" economic factors. Notwithstanding any leeway that persists with regard to the choice of relevant economic factors to include in the tax equity formula,²⁶⁰ this version of equity ("Equity 2.0"?) undoubtedly benefits from an aura of scientificity.²⁶¹

This scientificity also furnishes ready and plausible reasons to academics for *not* addressing concerns associated with race, ethnicity, gender, sexual orientation, disability, and other axes of subordination in the tax arena. In practice, it works even more effectively by rendering any mention of these subjects in a tax context immediately suspect.²⁶² But how can the discussion of sexual orientation, to take the axis of discrimination with which I am most intimately familiar, be considered suspect when the federal government has taken tax dollars, including the tax dollars of lesbians and gay men, to (1) deny legal recognition to same-sex relationships for all purposes of federal law under the so-called Defense of Marriage Act—an injunction that has been taken so far as to deny a lesbian U.S. citizen a passport because her application listed not her maiden name, but her name as changed on her marriage license

259. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

260. See *supra* text accompanying note 7.

261. See generally Hamill, *supra* note 118, at 731-34 (describing how economics is used to lend an air of scientific certainty to the claim that tax cuts for the wealthy will ultimately benefit everyone).

262. See *supra* note 117 and accompanying text. In conversation, Dorothy Brown has remarked to me that you simply cannot talk about race with tax academics. See also Brown, *supra* note 63, at 808 ("[M]any of those same academics are quite skeptical—even hostile—to the idea that race (and in certain instances gender) can ever be relevant when discussing tax policy.").

when she married her partner in Massachusetts;²⁶³ (2) require those whose same-sex relationships are legally recognized under state law to incur unnecessary legal and other expenses in an effort to replicate that legal recognition in a way that will be recognized by other states, again because of the Defense of Marriage Act;²⁶⁴ (3) until 2002, prevent the District of Columbia from implementing the domestic partnership regime that it had enacted in 1992;²⁶⁵ (4) amend the District of Columbia's Human Rights Act to allow Georgetown University to refuse to recognize lesbian and gay student groups despite a court ruling to the contrary;²⁶⁶ (5) actively engage in employment discrimination against lesbians and gay men through its "Don't Ask, Don't Tell" policy;²⁶⁷ and (6) provide rather precarious protections against discrimination on the basis of sexual orientation to its other employees?²⁶⁸ If "what counts as justice in taxation cannot be determined without considering how government allocates its resources,"²⁶⁹ then discussion of sexual

263. See 1 U.S.C. § 7 (2000); Dianne Williamson, *Gay Right Springs a Leak*, SUNDAY TELEGRAM (Worcester, MA), Mar. 4, 2007, at B1. For further discussion, see ANTHONY C. INFANTI, EVERYDAY LAW FOR GAYS AND LESBIANS (AND THOSE WHO CARE ABOUT THEM), ch. 6 (2007).

264. See 28 U.S.C. § 1738c (2000). For further discussion, see INFANTI, *supra* note 263, at chs. 6-8.

265. Compare Act of Dec. 21, 2001, Pub. L. No. 107-96, § 118, 115 Stat. 923, 950, with Act of Oct. 5, 1992, Pub. L. No. 102-382, 106 Stat. 1422, 1422.

266. District of Columbia Appropriations Act, 1990, Pub. L. No. 101-168, § 141, 103 Stat. 1267, 1284 (1989) (codified at D.C. CODE § 2-1402.41(3) (LexisNexis 2001 & Supp. 2007)).

267. See 10 U.S.C. § 654 (2000). For further discussion, see INFANTI, *supra* note 263, at ch. 4.

268. It is worth noting that the Bush Administration has been less than enthusiastic about enforcing these protections and, through executive order, has actually ended the unequivocal prohibition of discrimination on the basis of sexual orientation in the granting of security clearances that the Clinton Administration had put in place. See Christopher Lee, *Groups Applaud Discrimination Ban*, WASH. POST, Apr. 10, 2004, at A3 (discussing the administration's resistance to enforcing prohibitions against discrimination on the basis of sexual orientation for federal employees). Compare Memorandum from Stephen J. Hadley, Assistant to the President for Nat'l Sec. Affairs, to William Leonard, Dir., Info. Sec. Oversight Office, ¶ 12 (Sept. 29, 2005), available at <http://www.fas.org/sgp/isoo/guidelines.pdf>, with Exec. Order No. 12,968, § 3.1(c)-(d), 60 Fed. Reg. 40,245, 40,250 (Aug. 7, 1995). For further discussion, see INFANTI, *supra* note 263, at ch. 5.

269. MURPHY & NAGEL, *supra* note 4, at 14.

orientation (as well as other axes of subordination) is plainly in order. To use the cover of “neutrality” and “objectivity” to create a presumption that such discussion is irrelevant or improper serves only to advance the ideological hegemony of the dominant group. This presumption makes it easier to co-opt, neutralize, or diminish the alternative or oppositional ideas put forward by critical scholars—many of which, as we have already explored at length, were shaped by this specific hegemony to begin with. In short, the presumption works to both solidify and obscure the dominant group’s control over subordinated groups.

The influence of this construction of tax equity is also felt beyond the confines of legal academia. By isolating economic factors as the sole permissible topic for discussion, the dominant group has shifted the political debate over taxation away from the potentially difficult topics of race, gender, sexual orientation, disability, and other forms of invidious discrimination and toward a topic that it can easily manipulate and turn to its own advantage—economic class. For instance, when signing the Tax Reform Act of 1986 into law, President Reagan mentioned fairness six times in his short remarks and repeatedly invoked individualism and the Protestant work ethic—both of which are routinely used to justify group-based social inequality²⁷⁰—in support of the flattening of tax rates:

But for all tax reform’s economic benefits, I believe that history will record this moment as something more: as the return to the first principles. *This country was founded on faith in the individual, not groups or classes, but faith in the resources and bounty of each and every separate human soul.* Our Founding Fathers designed a democratic form of government to enlist the individual’s energies and fashioned a Bill of Rights to protect its freedoms. And in so doing, they tapped a wellspring of hope and creativity that was to completely transform history.

270. Sidanius and Pratto have identified “notions of individual responsibility” and the Protestant work ethic as among the most subtle, yet most important “hierarchy-enhancing [legitimizing myths]” in the United States. SIDANIUS & PRATTO, *supra* note 173, at 45-46. “Legitimizing myths” are “attitudes, values, beliefs, stereotypes, and ideologies that provide moral and intellectual justification for the social practices that distribute social value within the social system.” *Id.* at 45. Such myths are “hierarchy-enhancing” if they “justify and support group-based social inequality . . .” *Id.* at 45-46.

....

As tax rates escalated, the Tax Code grew ever more tangled and complex. . . . Blatantly unfair, our Tax Code became a source of bitterness and discouragement for the average taxpayer. *It wasn't too much to call it un-American.*

Meanwhile, *the steeply progressive nature of the tax struck at the heart of the economic life of the individual*, punishing that special effort and extra hard work that has always been the driving force of our economy

Throughout history, the oppressive hand of government has fallen most heavily on the economic life of the individuals. . . . We should not forget that this nation of ours began in a revolt against oppressive taxation. Our Founding Fathers fought not only for our political rights but also to secure the economic freedoms without which these political freedoms are no more than a shadow.

In the last 20 years we've witnessed an expansion and strengthening of many of our civil liberties, but our economic liberties have too often been neglected and even abused. We protect the freedom of expression of the author, as we should, but what of the freedom of expression of the entrepreneur, whose pen and paper are capital and profits, whose book may be a new invention or small business? What of the creators of our economic life, whose contributions may not only delight the mind but improve the condition of man by feeding the poor with new grains, bringing hope to the sick with new cures, vanishing ignorance with wondrous new information technologies?²⁷¹

As Marjorie Kornhauser has commented, "[t]his is rhetoric, but in the bad sense of the word. It seeks to persuade through bombast and confusion" ²⁷² In the quoted passages, President Reagan flatly dismisses the relevance of group-based considerations, wraps the wealthy in gauzy talk of the American dream, and manages to turn the economically privileged into a subordinated group.

After more than six years of the Bush Administration's championing tax cuts that greatly benefit the wealthy,²⁷³ we now have at our disposal a veritable bounty of examples

271. Remarks on Signing H.R. 3838 into Law, 22 WEEKLY COMP. PRES. DOC. 1423, 1424 (Oct. 22, 1986) (emphasis added).

272. Kornhauser, *supra* note 37, at 476.

273. See Hamill, *supra* note 118, at 711-26.

of rhetoric that seeks to justify these tax cuts by exploiting the unbending focus on the economic dimension of individuals in political discussions of tax fairness. Thus, we are told that (1) “every American who pays income taxes”²⁷⁴ should benefit from tax reductions—even though that group includes the economically privileged and excludes those among the working poor who do not pay income taxes, but who do pay payroll taxes;²⁷⁵ (2) conversely, providing tax relief to those too poor to pay income taxes (but who pay other taxes) is equivalent to sending them a welfare check;²⁷⁶ (3) “the American people should keep more of their own money”²⁷⁷—which plays into the misleading “everyday libertarian” notion that “all taxation takes what belongs to us; what we are fundamentally entitled to is our pretax incomes”;²⁷⁸ (4) eliminating the estate tax makes the tax laws fairer for small businesses and family farms²⁷⁹—which contributes to the impression that the estate tax applies to a broad spectrum of taxpayers across a range of wealth levels when, in fact, it only applies to a tiny (and currently decreasing) fraction of wealthy decedents’ estates, an impression that is designed to help foment “grassroots” support for elimination of the despised “death tax”;²⁸⁰

274. Remarks on Signing the Tax Increase Prevention and Reconciliation Act of 2005, 42 WEEKLY COMP. PRES. DOC. 943, 944 (May 17, 2006) [hereinafter TIPRA 2005 Remarks]; *see also* Remarks on Signing the Economic Growth and Tax Relief Reconciliation Act of 2001, 37 WEEKLY COMP. PRES. DOC. 858 (June 7, 2001) (“We cut taxes for every income tax payer. We target nobody in; we target nobody out. And tax relief is now on the way.”) [hereinafter EGTRRA 2001 Remarks].

275. *See* Lipman, *supra* note 11, at 56.

276. *See* Brown, *supra* note 79, at 804-05.

277. TIPRA 2005 Remarks, *supra* note 274, at 945; *see also* Remarks on Signing the Jobs and Growth Tax Relief Reconciliation Act of 2003, 39 WEEKLY COMP. PRES. DOC. 666, 667-68 (May 28, 2003) (containing a number of similar statements).

278. MURPHY & NAGEL, *supra* note 4, at 35.

279. EGTRRA 2001 Remarks, *supra* note 274, at 858-59.

280. Estate- and gift-tax critics maintain that abolishing transfer taxes will benefit all Americans, from farmers to small businessmen, from retired old economy workers to new economy professionals. A vote against repeal is a vote against average citizens. In criticizing Bill Clinton’s veto of H.R. 8, for example, Speaker of the House Dennis Hastert, R-Ill., stated that the president “disappointed millions of Americans who worry that a lion’s share of their life’s work will be passed on to the Internal Revenue Service rather than left to families.”

(5) progressive tax rates are “soaking the rich” by disproportionately imposing the burden of funding government on an ever smaller group of wealthy and successful individuals even though “everyone in this country is in it together” and should be contributing their fair share²⁸¹—suffice it to say that the basis for this argument, which cannot be untangled in this short space, has been described as “profoundly dishonest”;²⁸² (6) in a related argument, continuing to soak the rich is unsustainable over the long term because it will put the nation’s economy at risk (whether because of the tax system’s resulting susceptibility to an economic downturn or simply because the rich will decide to stop working)²⁸³—an argument that has rightly been labeled a “scare tactic[]”;²⁸⁴ and (7) in an argument related to both of the last two, merely mentioning the possibility of raising taxes on the wealthy is labeled “class warfare”—which effectively paints those at the bottom of the economic ladder (as well as those who advocate on their behalf) as violent aggressors.²⁸⁵ Of course, I could go on, but I think that I

Dennis J. Ventry Jr., *Straight Talk About the ‘Death’ Tax: Politics, Economics, and Morality*, 89 TAX NOTES 1159, 1160 (2000) (footnote omitted); *see also id.* (“[T]he editors at *The Wall Street Journal* claim that ‘estate-tax repeal has rolled over the political class on a wave of grassroots support, notably from farmers and small business, but also from average folks who think it’s unfair to confiscate the fruits of a lifetime of hard work.’”); *id.* at 1161 (“Seventeen percent of those surveyed by Gallup in June indicated that they would ‘personally benefit’ from the elimination of inheritance taxes. But less than 2 percent of all estates passing to heirs in any given year pay transfer taxes.”); *id.* at 1163 (In the context of estate tax repeal, “[t]he ‘true winners’ . . . are extremely wealthy families. Philanthropist George Soros recently argued, ‘The truth is that repealing the estate tax would give a huge tax windfall to the wealthiest 2 percent of Americans. . . . For the rest of the public, it is a cruel hoax.’”); CITIZENS FOR TAX JUSTICE, WHO PAID THE FEDERAL ESTATE TAX IN 2005? 1 (2007), available at <http://www.ctj.org/pdf/wherethemoneygoes.pdf> (indicating that the 18,431 estate tax returns filed in 2005 showing a taxable estate comprised only 0.8% of the people who died in 2004).

281. *See* Ari Fleischer, *The Taxpaying Minority*, WALL ST. J., Apr. 16, 2007, at A15.

282. Neil H. Buchanan, *Is It Really So Tough to Be Rich? The New, Brazen, and Completely Dishonest Attack on Progressive Taxation*, http://writ.lp.findlaw.com/commentary/20070423_buchanan.html (last visited Oct. 14, 2007).

283. J.T. Young, *Outer Limits of Class Warfare*, WASH. TIMES, Dec. 3, 2002, at A17; *see also* Fleischer, *supra* note 281 (making a similar argument).

284. Paul Krugman, *Losing Our Country*, N.Y. TIMES, June 10, 2005, at A21.

285. *See id.*; Lori Montgomery, *Democrats Craft New Tax Rules, New Image*,

have made my point that, as expected, the dominant group's construction of the concept of tax equity influences not only legal academic, but also everyday political debates about what constitutes "fair" treatment of taxpayers.

Overall, the concept of tax equity has a particularly hegemonic quality. Despite a series of otherwise devastating critiques, tax academics still turn to the concept in a casual, almost offhand manner for help in grappling with questions of tax fairness. Many of us also teach our students to think of the Code in tax equity terms from the earliest days of their introduction to the tax laws. The concept's seemingly universal appeal has even lulled critical tax scholars into framing their tax policy analyses in tax equity terms. Yet, notwithstanding its natural appeal, tax equity is far from a benign metric for gauging the fairness of our tax system. Rather, it insidiously shapes our thinking about tax fairness by tacitly singling out economic factors—to the exclusion of all others, no matter how relevant or worthy of discussion they may be. By packaging this very partial version of fairness in a way that gives it universal appeal, the dominant group has quite effectively been able to maintain its power and privilege by avoiding discussions that could result in "radical" proposals that might actually deliver on the promise of fairness in taxation to a much broader swath of society.

CONCLUDING REMARKS

As I mentioned at the beginning of this Article, my purpose in undertaking this project²⁸⁶ is to raise critical (and even mainstream) scholars' consciousness of the subtle, yet pernicious ways in which framing our tax policy analyses in tax equity terms can shape the results of those analyses. My goal has been to create some skepticism among all tax scholars—both "mainstream" and critical—about the "naturalness" of this idea²⁸⁷ and to get them to

WASH. POST, Apr. 23, 2007, at A1; Ben Stein, *In Class Warfare, Guess Which Class Is Winning*, N.Y. TIMES, Nov. 26, 2006, § 3, at 3.

286. As I also mentioned at the outset of this Article, this is a project that began with an earlier article debunking the artificial distinction between "mainstream" and "marginal" tax scholars. See *supra* note 17.

287. And, given the larger project, I hope that tax scholars will similarly begin to question the "naturalness" of other ideas that are treated as

think about how it may influence their thinking in unexpected ways.²⁸⁸ Eventually, I hope that this questioning will lead tax scholars to forge competing ideas about what makes a tax fair or just so that we can break the ideological hold of the concept of tax equity and replace it with something more meaningful that addresses the impact of taxation not only on the dominant group but also on all of the subordinated groups in our society.²⁸⁹

conventional wisdom in tax policy circles. *See supra* note 17.

288. *See* BOGGS, *supra* note 211, at 41.

289. *See id.* at 40-42. Again, by extension, I hold out this same hope with regard to other ideas that are treated as normal, natural, and incontrovertible in tax policy circles. *See supra* note 287.